(1) 89-1124

Supreme Court, U.S.
FILED
JAN 10 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-

In The

Supreme Court of the United States

October Term, 1989

AMERICAN BOOKSELLERS ASSOCIATION, INC., ASSOCIATION OF AMERICAN PUBLISHERS, INC., COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, NATIONAL ASSOCIATION OF COLLEGE STORES, INC., BOOKS UNLIMITED, INC., and AMPERSAND BOOKS,

Petitioners,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Where, as a result of plaintiffs' lawsuit, a state supreme court issues a narrowing interpretation of a facially unconstitutional statute, are plaintiffs "prevailing parties" within the meaning of 42 U.S.C. § 1988?

PARTIES TO THE PROCEEDING

The appellants in the court of appeals, all of whom are petitioners in this Court, were:

The American Booksellers Association, Inc., the major national trade association of booksellers. The Association has approximately 4,400 members, including chain bookstores, private bookstores, and department store bookstores. Its members account for more than 80% of all sales of books of general interest by booksellers nationwide. The Association has members located in Virginia, including appellees Books Unlimited, Inc. and Ampersand Books.

The Association of American Publishers, Inc., the major national trade association of publishers of general books, textbooks, and educational materials. The Association has approximately 235 members, consisting of most of the major commercial book publishers in this country, and many smaller and non-profit publishers, including university presses and scholarly associations. The books published by the Association's members are sold throughout the United States, including Virginia, at bookstores, department stores, supermarkets, drug stores, newsstands, and other outlets.

PARTIES TO THE PROCEEDING – Continued

The Council for Periodical Distributors Associations, the national trade association for more than 380 independent local wholesale distributors of magazines, paperback books, and newspapers. Its members are located and do business in every state of the United States, including Virginia.

The International Periodical Distributors Association, Inc., the national trade association for the principal periodical distributors. The Association's members are engaged in distributing or arranging for the distribution of paperback books and periodicals to wholesalers throughout the country for ultimate distribution to retailers and the public in every state in the United States, including Virginia.

The National Association of College Stores, Inc., a trade association comprising approximately 2,800 college and university bookstores located throughout the United States, including Virginia. Its members represent more than 95% of the higher education retail market for books.

Books Unlimited, Inc., a general retail bookstore located in Arlington, Virginia.

Ampersand Books, a general retail bookstore located in Alexandria, Virginia.

The appellants in the court of appeals were the Commonwealth of Virginia and William K. Stover, Chief of Police for Arlington County. The Commonwealth of Virginia is the only respondent in this Court.

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OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Virginia rendered on September 10, 1985 finding the Amendment unconstitutional is reported at 617 F.Supp. 699 (E.D. Va. 1985) and is reproduced at Appendix 1. The district court's opinion denying plaintiffs' motion for attorneys' fees and costs is unreported but is reproduced at Appendix 2. The opinion of the United States Court of Appeals for the Fourth Circuit entered on September 30, 1986 affirming the district court on the merits and reversing its denial of plaintiffs' motion for attorneys' fees and costs is reported at 802 F.2d 691 (4th Cir. 1986) and is reproduced at Appendix 3. On September 26, 1986, the defendants' Petition for Rehearing and Suggestion for Rehearing In Banc was denied (Appendix 4). The opinion of the United States Supreme Court rendered on January 25, 1988 is reported at 484 U.S. 383 (1988) and is reproduced at Appendix 5.

The decision of Virginia Supreme Court rendered on September 23, 1988 is reported at 372 S.E.2d 618 (1988) and is reproduced at Appendix 6. The order of the United States Supreme Court entered on October 17, 1988 vacating the decision of the United States Court of Appeals for the Fourth Circuit and remanding the case for further consideration in light of the opinion of the Virginia Supreme Court is reported at ___ U.S. ___, 109 S. Ct. 254 (1988) and is reproduced at Appendix 7. The opinion of the United States Court of Appeals for the Fourth Circuit rendered on August 16, 1989, finding the Amendment constitutional in light of the Virginia Supreme Court decision and affirming the denial of plaintiffs' motion for attorneys' fees and costs is reported

at 882 F.2d 125 (4th Cir. 1989) and is reproduced at Appendix 8. On October 13, 1989, the plaintiffs' Petition for Rehearing and Suggestion for Rehearing In Banc on the denial of their motion for attorneys' fees and costs was denied (Appendix 9).

JURISDICTION

This action, arising under 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201, 2202, and the First, Fifth and Fourteenth Amendments to the United States Constitution, challenged the constitutionality of an amendment to Virginia Code § 18.2-391 (1982 and 1987 Supp.) (the "Amendment"). The jurisdiction of the district court was invoked pursuant to 28 U.S.C. §§ 1331, 1343(3) and 1343(4).

On appeal, the United States Court of Appeals for the Fourth Circuit affirmed the district court's ruling that the Amendment was unconstitutional and reversed the district court's denial of plaintiffs' motion for attorneys' fees and costs (Appendix 3). On appeal from the Fourth Circuit, the United States Supreme Court ruled that plaintiffs had stated a case or controversy, but declined to rule on the merits (Appendix 5). The Court certified two questions to the Virginia Supreme Court pursuant to Rule 5:42 of the Supreme Court of Virginia. After the Virginia Supreme Court rendered its answers to those questions, the United States Supreme Court vacated the decision of the Fourth Circuit and remanded the case for further consideration in light of those answers (Appendix 7).

On remand, on August 16, 1989 the Fourth Circuit found the Amendment, as narrowed by the Virginia Supreme Court, constitutional, and affirmed the district

court's denial of plaintiffs' motion for attorneys' fees and costs pursuant to 42 U.S.C. § 1988 (Appendix 8). On October 13, 1989, the Fourth Circuit entered an order denying plaintiffs' petition for rehearing and suggestion for rehearing in banc on the question of whether the litigated result of a narrowing of a facially unconstitutional state statute made plaintiffs "prevailing parties" under 42 U.S.C. § 1988 (Appendix 9).

Jurisdiction of the Supreme Court of the United States to review by certiorari the Court of Appeals' denial of plaintiffs' motion for attorneys' fees and costs is conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions

U.S. Const. Amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. Amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any

criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutory Provisions

42 U.S.C. § 1988:

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to

and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Virginia Code § 18.2-390:

(1) "Juvenile" means a person less than eighteen years of age.

(2) "Nudity" means a state of undress so as to expose the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered or uncovered male genitals in a discernibly turgid state.

(3) "Sexual conduct" means actual or explicitly simulated acts of masturbation, homosexuality, sexual intercourse, or physical contact in an act of apparent sexual stimulation or gratification with a person's clothed or unclothed genitals, pubic area, buttocks or, if such be female, breast.

(4) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(5) "Sadomasochistic abuse" means actual or explicitly simulated flagellation or torture by or upon a person who is nude or clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(6) "Harmful to juveniles" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it (a) predominately appeals to the prurient, shameful or morbid interest of juveniles, (b) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for juveniles, and (c) is, when taken as a whole, lacking in serious literary, artistic, political or scientific value for juveniles.

(7) "Knowingly" means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both (a) the character and content of any material described herein which is reasonably susceptible of examination by the defendant, and (b) the age of the juvenile, provided however, that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such juvenile.

Virginia Code § 18.2-391:

> Unlawful acts. – (a) It shall be unlawful for any person knowingly to sell or loan to a juvenile, or to knowingly display for commercial purpose in a manner whereby juveniles may examine and peruse:
>
> (1) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts sexually explicit nudity, sexual conduct or sadomasochistic abuse and which is harmful to juveniles, or
>
> (2) Any book, pamphlet, magazine, printed matter however reproduced or sound recording which contains any matter enumerated in paragraph (1) of this subsection, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sadomasochistic abuse and which, taken as a whole, is harmful to juveniles.
>
> (b) It shall be unlawful for any person knowingly to sell to a juvenile an admission ticket or pass, or knowingly to admit a juvenile to premises whereon there is exhibited a motion picture, show or other presentation which, in whole or in part, depicts sexually explicit nudity, sexual conduct or sadomasochistic abuse and which is harmful to juveniles or to exhibit any such motion picture at any such premises which are not designed to prevent viewing from any public way of such motion picture by juveniles not admitted to any such premises.
>
> (c) It shall be unlawful for any juvenile falsely to represent to any person mentioned in subsection (a) or subsection (b) hereof, or to his agent, that such juvenile is eighteen years of age or older, with the intent to procure any material set forth in subsection (a), or with the intent to

procure such juvenile's admission to any motion picture show or other presentation, as set forth in subsection (b).

(d) It shall be unlawful for any person knowingly to make a false representation to any person mentioned in subsection (a) or subsection (b) hereof or to his agent, that he is the parent or guardian of any juvenile, or that any juvenile is eighteen years of age, with the intent to procure any material set forth in subsection (a), or with the intent to procure such juvenile's admission to any motion picture, show or other presentation, as set forth in subsection (b).

(e) Violation of any provision hereof shall constitute a Class 1 misdemeanor.

STATEMENT OF THE CASE

On July 1, 1985, an amendment to § 18.2-391 of the Code of Virginia (the "Amendment") became effective. The Amendment on its face made it unlawful to display materials not obscene as to adults, but obscene as to children of any age, at business premises where such children could examine or peruse such materials. As a result of the passage of the Amendment, this action was commenced two weeks later, on July 16, 1985, by a group of plaintiffs who either are themselves, or who represent, citizens of Virginia, and publishers, wholesalers, retailers and distributors of books, magazines and newspapers in the State of Virginia and, in particular, in the County of Arlington and City of Alexandria. The bringing of this action reflected plaintiffs' concern that the Amendment unconstitutionally prevents adults and older juveniles

from gaining access to First Amendment protected materials in which plaintiffs trade.

The district court ruled that the plaintiffs stated a case or controversy, found the Amendment to be unconstitutional and permanently enjoined the defendants from enforcing it. *American Booksellers Ass'n, Inc. v. Strobel,* 617 F. Supp. 699 (E.D. Va. 1985). The court specifically found that the plaintiffs "have adequately demonstrated a reasonable fear that the challenged amendment will be enforced against them, that the amendment raises substantial first amendment concerns, and that the amendment has caused and will continue to cause direct, immediate economic injury to their businesses." *Id.* at 703-704.

Shortly after, plaintiffs filed a motion for costs and attorneys' fees pursuant to 42 U.S.C. § 1988. On October 23, 1985, the district court denied the motion, finding that, although no single factor justified the denial, a combination of factors constituted "special circumstances" under the statute (Appendix 2).

The Fourth Circuit Court of Appeals affirmed the judgment of the district court on the merits, but directed the award of reasonable attorneys' fees to plaintiffs. *American Booksellers Ass'n, Inc. v. Commonwealth of Virginia,* 802 F.2d 691 (4th Cir. 1986), *vacated* ___ U.S. ___, 109 S.Ct. 254 (1988). In affirming the district court's decision on the merits, the Fourth Circuit concluded that "the amendment discourages the exercise of first amendment rights in a real and substantial fashion, and that it is not readily subject to a narrowing interpretation so as to

withstand an overbreadth challenge." *Id.* at 696. On September 26, 1986, the Fourth Circuit denied the Commonwealth's Petition For Rehearing and Suggestion For a Rehearing In Banc (Appendix 4), and the Commonwealth appealed to this Court.

This Court unanimously found that plaintiffs had "an actual and well-founded fear that the law will be enforced against them," and noted that "the alleged danger of this statute is, in large measure, one of self-censorship." *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 392-393 (1988). On the merits, this Court refused to accept the Attorney General's interpretation of the law as authoritative since "the Attorney General does not bind the state courts or local law enforcement authorities." *Id.* at 395. Finding "substantial constitutional problems" under the statute, this Court certified two questions to the Virginia Supreme Court, making clear that the State Supreme Court's authoritative construction of the statute was necessary to clarify the Amendment's impact upon plaintiffs' First Amendment rights.

In answering the certified questions, the Virginia Supreme Court adopted a construction which, by substantially narrowing the scope of the statute, assuaged plaintiffs' "well-founded" fears that the statute encompasses a broad array of constitutionally protected material. The Virginia Supreme Court construed the phrase "harmful to juveniles" in such a way as to make such material "as a practical matter, indistinguishable"[1] from

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[1] Brief of the Virginia Attorney General on behalf of the Commonwealth before the Virginia Supreme Court, p. 16.

obscenity, thus vindicating plaintiffs' First Amendment rights, and further eliminated the necessity for plaintiffs to take any affirmative action to comply with the statute's proscriptions. *Commonwealth of Virginia v. American Booksellers Ass'n, Inc.*, 372 S.E.2d 618 (1988).

This Court remanded the case to the Fourth Circuit for reconsideration in light of the Virginia Supreme Court's narrowing interpretation (Appendix 7). On remand, the Fourth Circuit concluded that the Virginia Supreme Court's interpretation rendered the Amendment constitutional because the statute, as narrowed, imposes a minimal burden on booksellers. *American Booksellers Ass'n, Inc. v. Commonwealth of Virginia*, 882 F.2d 125 (4th Cir. 1989). The Fourth Circuit reversed the judgment of the district court finding the Amendment unconstitutional and, without discussion, affirmed the district court's denial of attorneys' fees. *Id.* at 128. The Fourth Circuit denied plaintiffs' motion for attorneys' fees without determining whether the fact that a narrowing construction had been obtained from the Virginia Supreme Court entitled plaintiffs to be considered as "prevailing parties" under § 1988.[2] The Fourth Circuit further denied plaintiffs' Petition For Rehearing and Suggestion For Rehearing In Banc on plaintiffs' motion for attorneys' fees.

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[2] The Fourth Circuit's only statement regarding the attorneys' fees issue was that the district court's "denial of attorneys' fees is affirmed." 882 F.2d at 128.

ARGUMENT

The amended Virginia statute challenged by plaintiffs was initially found overbroad and unconstitutional by both the district court and the Fourth Circuit. On appeal, this Court unanimously held that plaintiffs alleged an actual and well-founded fear of prosecution under the law, noting that:

> The State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise. We conclude that plaintiffs have alleged an actual and well-founded fear that the law will be enforced against them. Further, the alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution.

484 U.S. at 392-393. On the merits, this Court sought an authoritative interpretation of the Amendment from the Virginia Supreme Court, refusing to accept the narrowing construction of the law suggested by the Virginia Attorney General since "the Attorney General does not bind the state courts or local law enforcement authorities." *Id.* at 395. This Court noted that even under the narrowing construction offered by the Attorney General the Amendment might still raise "substantial constitutional questions," but that the nature of the First Amendment restrictions would be substantially reduced if the State Supreme Court opted to narrowly interpret the Amendment.

Plaintiffs' challenge to the Amendment has resulted in the lifting of impossible burdens which the statute

facially imposed on plaintiffs[3] and has achieved virtually all the benefits plaintiffs sought in bringing suit. A statute which read broadly on its face; which was so read by both the district court and the Court of Appeals; and which this Court found at best ambiguous, was narrowed by the Virginia Supreme Court to bring it within constitutional bounds.

It was not until the Virginia Supreme Court authoritatively narrowed the scope of the Amendment that plaintiffs' First Amendment rights were vindicated. Indeed, the Commonwealth itself conceded at oral argument before this Court that the Amendment would be unconstitutional unless the narrow interpretation offered by it were accepted. Had plaintiffs not brought this lawsuit, a statute held facially unconstitutional by the district court and the Fourth Circuit would have remained overbroad, subjecting plaintiffs to the threat of prosecution for displaying materials that the Virginia Supreme Court ultimately read out of the Amendment's scope.

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[3] In finding the Amendment unconstitutional on its face, the Fourth Circuit found that "[f]orcing a bookseller to create a separate, monitored adults only section, requiring that materials be sealed, or taking the materials off display and keeping them 'under the counter' unreasonably interferes with the booksellers' right to sell the restricted materials and the adults' ability to buy them." The Fourth Circuit further found that none of these compliance measures relieved the impossible task of reviewing each item in a bookseller's inventory to determine which ones required special treatment and "that a retailer cannot rely on the Amendment to guide him in deciding what are the least restrictive modifications in display methods which would be sufficient to satisfy the statute." 802 F.2d at 696.

The Fourth Circuit's reversal of its initial ruling, awarding fees to the plaintiffs, failed to recognize that, in fact, plaintiffs have achieved the very benefit they sought in bringing suit, i.e., relief from the impossible task of complying with a statute that on its face apparently forced booksellers to take steps to deny juveniles access to a broad range of material deemed "harmful" to them, thereby unreasonably restricting the access of adults and older juveniles to that same material. By challenging the Virginia amendment, plaintiffs have secured for themselves the ability to publish, distribute and display First Amendment protected materials and have achieved for the citizens of Virginia the right of access to such materials.[4] Under the prior rulings of this Court, it should not matter for this purpose whether success is obtained by forcing a narrowing interpretation which makes the

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[4] In reversing the district court's decision in the initial appeal, the Fourth Circuit noted that:

> The court recognized that none of these factors alone would constitute the necessary special circumstances to justify denial of attorneys' fees. It held, however, that "with all these factors combined, the Court finds it more equitable to let the costs lie where they land." The district court cited no authority for the action, and we find none.
>
> *Although the Booksellers certainly benefit from the results of this litigation, the citizens of Virginia will likewise continue to enjoy unfettered freedom of expression.* We do not find it unjust that the taxpayers will have to bear the costs of the award.

802 F.2d at 697 (emphasis supplied).

statute virtually coterminous with other laws, or by invalidation.[5]

This Court has repeatedly made clear that the availability of attorneys' fees is not dependent upon the issuance of formal relief, but rather on the achievement of "some of the benefit the parties sought in bringing suit." *Texas State Teachers v. Garland Independent School District*, ___ U.S. ___, 109 S.Ct. 1486, 1491 (1989). *See also Hewitt v. Helms*, 482 U.S. 755, 760-762 (1987). As this Court explained in *Hewitt:*

> In all civil litigation, the judicial decree is not the end but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces – the payment of damages, or some specific performance, or the termination of some conduct. Redress is sought through the court, but from the defendant. This is no less true of a declaratory judgment suit than of any other action. *The real value of the judicial pronouncement – what makes it a proper judicial resolution of a "case or controversy" rather than an advisory opinion – is in the settling of some dispute which affects the behavior of the defendant towards the plaintiff.* The "equivalency" doctrine is simply an acknowledgment of the primacy of the redress over the means by which it is obtained. If the defendant, under the pressure of the lawsuit, pays over a money claim before the judicial judgment is pronounced, the plaintiff has "prevailed" in his suit, because he has obtained the substance of what he sought. Likewise in a

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[5] See *Hensley v. Eckerhart*, 461 U.S. 424, 431 (1983), where this Court cited with approval the award of attorneys' fees based on "a significant concession from defendants."

> declaratory judgment action: if the defendant, under pressure of the lawsuit, alters his conduct (or threatened conduct) towards the plaintiff that was the basis for the suit, the plaintiff will have prevailed.

Id. at 761 (emphasis added).

Plaintiffs here were faced with the burden of complying with a statute that, on its face, threatened criminal prosecution for the display of constitutionally protected materials. Both the district court and the Fourth Circuit found the Amendment facially overbroad and unconstitutional. This Court refused to apply an interpretation offered by the Attorney General as one capable of salvaging the Amendment's constitutionality since that interpretation would not be binding on the state courts or local law enforcement authorities, and thus could not itself assuage plaintiffs' constitutional concerns.

Simply put, this case resulted in the litigated narrowing of a state statute that, on its face, raised substantial constitutional concerns. In the context of a regulation chilling the exercise of First Amendment rights such a result is neither a technical nor a *de minimus* one, but rather one that directly affects booksellers' abilities to exercise their First Amendment rights and to make constitutionally protected material available to the public without the threat of prosecution.

The Fourth Circuit's decision to deny plaintiffs' attorneys' fees, moreover, has an impact that reaches far beyond this case. Often, in First Amendment challenges, success is achieved by obtaining a judicially imposed narrowing construction of the statute in question. *See, e.g. Boos v. Barry*, 485 U.S. 312 (1988) (affirming a decision

narrowly construing a federal statutory clause prohibiting "congregation" within 500 feet of an embassy and "refusal to disperse" having been ordered to do so); *Posados de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 335 (1986) (affirming a decision narrowly construing a Puerto Rico statute prohibiting the advertisement of gambling casinos to the public of Puerto Rico); *Schneider v. Smith*, 390 U.S. 27 (1968) (narrowly construing a federal statute authorizing the President to issue regulations "to safeguard" vessels in the jurisdiction of the United States from acts of sabotage).

This Court has, in fact, supported the view that such a result may be more beneficial than a finding of unconstitutionality, which may result in "throwing out the baby with the bath water." "[T]he federal courts have the duty to avoid constitutional difficulties by . . . [adopting a narrowing construction] if such a construction is fairly possible." *Boos v. Barry*, 485 U.S. 312, 108 S.Ct. 1157, 1169 (1988).[6] *Cf. Brockett v. Spokane Arcades, Inc.*, 472 U.S. 503, 504 (1985) ("the normal rule [is] that partial, rather than facial, invalidation is the required course").

An example of the alternative to finding a narrowing construction is presented in a case involving a Georgia statute similar to that challenged in this case. The District Court for the Northern District of Georgia struck

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[6] In this case, neither the district court nor the Fourth Circuit found the Virginia Amendment fairly susceptible of a construction bringing it within constitutional bounds. This Court declined to address the question, choosing instead to ask the Virginia Supreme Court to elaborate on the meaning of the Amendment.

down the statute as unconstitutional after the Georgia Supreme Court refused to construe it.[7] *See American Booksellers Ass'n, Inc. v. Webb*, 254 Ga. 399, 329 S.E.2d 495 (1985) (declining to construe); *American Booksellers Ass'n, Inc. v. Webb*, 643 F.Supp. 1546 (N.D. Ga. 1986) (holding unconstitutional).

Had the Virginia Supreme Court, like the Georgia Supreme Court, refused to construe its statute, this Court or the Fourth Circuit would have been likely to strike down the statute. (In fact, the Fourth Circuit had done just that in its earlier decision.) The plaintiffs' challenge to the Amendment instead narrowed the statute to constitutional dimensions. Yet, under the Fourth Circuit's decision, plaintiffs' right to attorneys' fees when challenging these facially overbroad provisions – and thus vindicating their constitutional rights – depends on whether a state supreme court decides to construe the provision or declines to construe it.[8]

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[7] The district court initially enjoined enforcement of the Georgia minors' access provision of the Amendment but abstained from final decision of the federal constitutional issues. *American Booksellers Ass'n, Inc. v. Webb*, 590 F.Supp. 677 (N.D. Ga. 1984). Plaintiffs in that case appealed the district court's decision to abstain to the Eleventh Circuit, which granted a joint motion by the parties to certify questions to the Georgia Supreme Court, including one relating to the construction to be given to the minors' access provision. *American Booksellers Ass'n, Inc. v. Webb*, 744 F.2d 784 (11th Cir. 1984).

[8] The problem plaintiffs face here may arise yet again in an action pending before the District Court of New Mexico challenging the constitutionality of the New Mexico minors' access law.

To deny plaintiffs' motion for attorneys' fees in this case would deter future challenges to unconstitutional statutes that, while facially overbroad and while chilling the exercise of constitutional rights, may become narrowed to constitutional dimensions by virtue of the litigation, since plaintiffs cannot expect to recover their fees. Such a precedent would emasculate the prophylactic, "private attorney general" legislative purpose underlying § 1988.

Whether plaintiffs' First Amendment rights were vindicated through a formal judicial decree in their favor or through the narrowing of the Amendment to constitutional dimensions, the result is the same. By virtue of their challenge to the Amendment, the threat of prosecution under the amended statute has been lifted. Plaintiffs, therefore, are entitled to their reasonable attorneys' fees and costs.

CONCLUSION

The Fourth Circuit's decision to deny plaintiffs' motion for attorneys' fees and costs conflicts with the spirit of 42 U.S.C. § 1988 and this Court's precedents regarding application of that section, may materially affect other similar pending litigation, and will substantially deter future challenges to state statutes that on their face chill the exercise of First Amendment rights. For all of these reasons, this Court should grant plaintiffs' petition for certiorari.

Respectfully submitted,

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APPENDIX

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APPENDIX 1

AMERICAN BOOKSELLERS ASSOCIATION, et al., Plaintiffs.

v.

Charles T. STROBEL, Director of Public Safety, et al., Defendants.

Civ. A. No. 85-816-A.

United States District Court,
E.D. Virginia,
Alexandria Division.

Sept. 10, 1985.

MEMORANDUM OPINION

RICHARD L. WILLIAMS, District Judge.

Introduction

This matter comes before the Court on a trial to the bench on September 5, 1985. Plaintiffs challenge the constitutionality of the 1985 Amendment to § 18.2-391 of the Code of Virginia. The relevant statutes are set out below, and the challenged portion (hereafter "the amendment") is highlighted:

> § 18.2-390. Definitions. – As used in this article:
>
> (1) "Juvenile" means a person less than eighteen years of age.
>
> (2) "Nudity" means a state of undress so as to expose the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, of the depiction of covered or uncovered male genitals in a discernibly turgid state.

(3) "Sexual conduct" means actual or explicitly simulated acts of masturbation, homosexuality, sexual intercourse, or physical contact in an act of apparent sexual stimulation or gratification with a person's clothed or unclothed genitals, pubic area, buttocks or, if such be female, breast.

(4) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(5) "Sadomasochistic abuse" means actual or explicitly simulated flagellation or torture by or upon a person who is nude or clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(6) "Harmful to Juveniles" means that quality of any description or representation, in whatever form, or nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it (a) predominately appeals to the prurient, shameful or morbid interest of juveniles, (b) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for juveniles, and (c) is, when taken as a whole, lacking is serious literary, artistic, political or scientific value for juveniles.

(7) "Knowingly" means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both (a) the character and content of any material described herein which is reasonably susceptible of examination by the defendant, and (b) the age of the juvenile, provided however, that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide

attempt to ascertain the true age of such juvenile.

§ 18.2-391. Unlawful acts. – (a) It shall be unlawful for any person knowingly to sell or loan to a juvenile, *or to knowingly display for commercial purpose in a manner whereby juveniles may examine and peruse:*

(1) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts sexually explicit nudity, sexual conduct or sadomasochistic abuse and which is harmful to juveniles, or

(2) Any book, pamphlet, magazine, printed matter however reproduced or sound recording which contains any matter enumerated in paragraph (1) or this subsection, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sadomasochistic abuse and which taken as a whole, is harmful to juveniles.

(b) It shall be unlawful for any person knowingly to sell to a juvenile an admission ticket or pass, or knowingly to admit a juvenile to premises whereon there is exhibited a motion picture, show or other presentation which, in whole or in part, depicts sexually explicit nudity, sexual conduct or sadomasochistic abuse and which is harmful to juveniles or to exhibit any such motion picture at any such premises which are not designed to prevent viewing from any public way of such motion picture by juveniles not admitted to any such premises.

(c) It shall be unlawful for any juvenile falsely to represent to any person mentioned in subsection (a) or subsection (b) hereof, or to his agent, that such juvenile is eighteen years of age or older, with the intent to procure any material

> set forth in subsection (a), or with the intent to procure such juvenile's admission to any motion picture, show or other presentation, as set forth in subsection (b).
>
> (d) It shall be unlawful for any person knowingly to make a false representation to any person mentioned in subsection (a) or subsection (b) hereof or to his agent, that he is the parent or guardian of any juvenile, or that any juvenile is eighteen years of age, with the intent to procure any material set forth in subsection (a), or with the intent to procure such juvenile's admission to any motion picture, show or other presentation, as set forth in subsection (b).
>
> (e) Violation of any provision hereof shall constitute a Class I misdemeanor.

The named defendants are charged by law with the duty of enforcing the challenged portion of the statute. The Attorney General of Virginia has exercised his right to intervene pursuant to 28 U.S.C. § 2403(b).

The plaintiffs here are five bookstore trade associations, two individual book stores and two individual residents of the City of Alexandria. They contend that the 1985 Amendment is facially invalid in that it unconstitutionally infringes upon rights protected by the first amendment, and in that it constitutes a prior restraint upon free speech. Defendants argue that there is no case or controversy between themselves and the plaintiffs, that plaintiffs do not have standing to challenge the Amendment, that the Court should abstain from considering the constitutionality of the Amendment, and that in any event that Amendment does not violate the first amendment.

Pursuant to Rule 52(a), the Court hereby makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

Helen Ross is the owner of plaintiff Ampersand Books, an Alexandria bookstore belonging to the American Booksellers Association. Ampersand Books carries approximately 12,000-13,000 different titles at any one time, with multiple copies of most titles. The books are arranged in sections according to subject matter, including children's books, science fiction, mystery, fiction, romance, art, health, photography and best sellers. Children frequently shop at Ampersand Books, often with their parents, and sales of children's books constitute approximately 10% of Ampersand's business. In terms of its size, structure and clientele, Ampersand is similar to many other Northern Virginia bookstores that carry a wide variety of titles.

Carol Johnson is the owner of plaintiff Books Unlimited an, Arlington bookstore that belongs to the American Booksellers Association. Books Unlimited is somewhat atypical in that it relies more heavily upon sales of children's books than other area bookstores. However, approximately 10-15% of its books may not be displayed under the new law. The store's books are arranged by subject matter in a manner similar to the structure at Ampersand Books.

In all bookstores, the display of a particular book, and the manner in which it is displayed play a critical role in determining how many copies the bookstore will sell. Customers often become familiar with a book, and

desire to purchase it only after browsing and looking through the shelves. Customers are generally hesitant about asking for help in locating books, and they are especially reluctant to ask for books that have a strong sexual content. Therefore, at least one copy of every title carried by Ampersand books is on display.

Based upon the testimony of two local bookstore owners, and after carefully reviewing the exhibits introduced from their stores, the Court concludes that the average general bookstore in the Northern Virginia area carries a significant percentage of materials (varying between 5-25%) that are "harmful to juveniles" as defined in the statute. The books that fall within the restrictions come from a wide variety of subject matters, such as romance, fiction, photography, best sellers, science fiction and health. Most of these books come within the statute's fairly broad ambit on the basis of their content. However, the Court finds that the covers of some books and magazines as sexually explicit "pictures" and "photographs" under the statute, are also covered by the statute.

In order to comply with the 1985 amendment, bookstores are faced with approximately four choices. First, a bookstore could simply bar all persons under the age of 18 from its store. However, this alternative would certainly have a dramatic impact upon the store's sales of children's books. Moreover, such a move would create the impression that the store deals primarily in "adults only" or pornographic material, which would have a devastating impact upon the store's business.

Second, the store could create an "adults only" section in order to display the proscribed material. However,

the books covered by the statute come from a wide variety of literary disciplines, such as fiction, romance, photography, and best sellers; books which are "harmful to minors" are mixed into so many different subject areas that it would be almost impossible for booksellers to sort through the books to create a new section. An "adults only" area would be costly to create, difficult to monitor, and would create a great deal of confusion in the mind of a consumer searching for a particular book. Moreover, many adults would be reluctant and embarrassed to browse in an "adults only" corner of the store and sales of books placed in this new area would undoubtedly drop.

Third, the bookstore could simply limit its inventory to books not regulated by the new law. However, since the new law would restrict the display of a number of very popular books, including some best sellers, this alternative is not commercially feasible. In addition, this alternative would create practical difficulties in ordering new books because bookstores rarely have the opportunity to review books before ordering them.

Finally, the bookstore could place all of the prescribed material behind a counter where they would not be displayed to the public. However, due to the large number of books involved, this alternative would require bookstores to significantly alter the structure of their stores. Moreover, since the display of books is so crucial to their sale, such a move would substantially hurt sales.[1]

---

[1] The Court notes with some concern that, with respect to most of the above alternatives, bookstores might not be able to continue their practice of hiring minors for part time positions.

CONCLUSIONS OF LAW

A. Case or controversy and standing requirements

Initially, the Court must determine whether an actual case or controversy exists, and whether the plaintiffs have standing to challenge the constitutionality of the new amendment. The "case or controversy" doctrine does not mean that a plaintiff must be arrested or prosecuted before he or she may challenge the constitutionality of a statute. *Steffel v. Thompson*, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974). However, a plaintiff must be able to assert a reasonable fear of enforcement of the statute, and that therefore the allegedly unconstitutional statute interferes with how the plaintiff ordinarily conducts his or her affairs. *Entertainment Concepts, Inc. III v. Maciejewski*, 631 F.2d 497 (7th Cir. 1980), *cert. denied*, 450 U.S. 919, 101 S.Ct. 1366, 67 L.Ed.2d 346 (1981); *International Society for Krishna Consciousness v. Eaves*, 601 F.2d 809 (5th Cir. 1979).

Similarly, in order to satisfy the requirement of standing, a litigant must demonstrate that he or she is somehow adversely affected by the challenged statute. This requirement is not satisfied if the party merely asserts the common interest of society as a whole in having a judicial determination on the matter. In short, a litigant must demonstrate a "personal stake" in determining the validity of the law, so that the controversy before the Court is both "real and substantial." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241, 57 S.Ct. 461, 464, 81 L.Ed. 617 (1937).

Where first amendment rights are at stake, case or controversy and standing requirements have been relaxed so that litigants may preserve rights of free expression.

See Secretary of State v. Munson, ___ U.S. ___, 104 S.Ct. 2839, 81 L.Ed.2d 786, 796 (1984) ("where there is a danger of chilling free speech, the concern that constitutional adjudication be avoided wherever possible may be outweighed by society's interest in having the statute challenged"); *see also Broadrick v. Oklahoma*, 413 U.S. 601, 611, 93 S.Ct. 2908, 2847, 37 L.Ed.2d 830 (1973) (challenge to statute restricting political activities of state civil servants permitted since the statute's existence may discourage persons not before the Court from engaging in protected speech). This relaxed stance reflects the treasured position occupied by the first amendment, and the consequent importance of having first amendment controversies adjudicated promptly.

The evidence in the record clearly establishes that a real controversy exists and that the individual bookstores have standing to challenge the 1985 amendment. The bookstores have adequately demonstrated a reasonable fear that the challenged amendment will be enforced against them, that the amendment raises substantial first amendment concerns, and that the amendment has caused and will continue to cause direct, immediate economic injury to their businesses. Furthermore, the retail associations also have standing in this matter because they are representatives of bookstores who are suffering immediate or threatened injury as a direct result of the challenged statute. *See Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977) (trade association has standing to bring suit on behalf of its members if its members would otherwise have standing, if the interests to be protected are germane to the purpose of the organization, and if the

suit does not require the participation of the individual members); *see also Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975).

The individual plaintiffs, Jessica Bush and her minor daughter Amy Bush do not have standing to challenge the amendment. Jessica and Amy Bush claim that they have standing simply as adult and juvenile members of the community. However, neither has alleged that they would be subject to prosecution under the challenged amendment, nor do they allege any economic loss as a result of the new law. The Bushes have failed to assert anything more than an abstract interest in the availability of reading materials in bookstores, an interest which is no different from the interests of all other local citizens who patronize bookstores. *See American Booksellers Association v. Rendell*, 481 A.2d 919, 932 (Pa.Super.1984).

B. Abstention

Defendant contends that the Court should abstain in this case so that state courts may be given the opportunity to construe the 1985 amendment and determine its constitutionality. However, this case does not fit within any of the three narrowly defined areas where abstention by a federal court may be appropriate. Specifically, state court resolution of this matter would not render unnecessary, nor substantially modify the federal constitutional questions; there are simply no difficult or unclear issues of state law raised here. *See Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941) (abstention may be appropriate where the case presents unsettled questions of state law); *see also Younger v. Harris*, 401

U.S. 37 91, S.Ct. 746, 27 L.Ed.2d 669 (1971) (abstention may be appropriate where there is a constitutional challenge to ongoing state criminal proceedings); *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943) (abstention may be appropriate where there is an adequate state regulatory forum for review of the claims, and where that forum is the most appropriate forum due to the presence of basic state policy considerations). Further, the significant first amendment questions raised by the plaintiffs' claims clearly make abstention inappropriate. *See American Booksellers Association v. McAuliffe*, 533 F.Supp. 50 (N.D.Ga.1981) (declaring Georgia statute restricting display of certain sexually explicit materials unconstitutional).

Overbreadth

As a general matter, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95, 92 S.Ct. 2286, 2290, 33 L.Ed.2d 212 (1972). The Supreme Court has upheld restrictions based upon content "only in the most extraordinary circumstances." *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 65, 103 S.Ct. 2875, 2879, 77 L.Ed.2d 469 (1983). Therefore, the challenged amendment, which clearly restricts access to certain materials on the basis or their content, must be carefully examined to ensure that it does not impermissibly infringe upon first amendment values.

The sole justification offered by the defendants for the challenged amendment is the government's interest in

shielding minors from certain adult reading material.[2] The Supreme Court, recognizing that the state may play some role in promoting the moral well-being of its youth, has upheld the constitutionality of laws which prohibit the *sale* of materials which, though not obscene as to adults, were deemed to be "harmful to minors." *Ginsberg v. New York*, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968).[3] The defendants assert that the 1985 amendment, which prohibits the *display* of non-obscene material in a manner whereby one under the age of 18 *may* peruse it, is constitutionally permissible under *Ginsberg*.

The Court disagrees. In promoting the morals of its youth by restricting their access to certain communications, the state may not create barriers which simultaneously place substantial restrictions upon an adult's access to those same protected materials. In *Butler v. Michigan*, 352 U.S. 380, 77 S.Ct. 524, 1 L.Ed.2d 412 (1957), the Supreme Court struck down a Michigan law which made it unlawful for anyone to "make available for the general reading public . . . a book . . . found to have a potentially deleterious influence on youth." 352 U.S. at 382-83, 77 S.Ct. at 525. Writing for a unanimous Court, Justice Frankfurter rejected a contention similar to the one offered by the defendants here:

---

[2] Obviously, the materials regulated by the Amendment are not "obscene" under *Miller v. California*, 413 U.S. 15, 24, 93 S.Ct. 2607, 2614, 37 L.Ed.2d 419 (1973), and are therefore entitled to first amendment protection.

[3] The *Ginsberg* decision, as modified by *Miller*, has been codified by Virginia in Virginia Code § 18.2-390, 391 (1984).

> The state insists that, by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely, this is to burn the house to roast the pig.

352 U.S. at 383, 77 S.Ct. at 525. Here, as in *Butler*, the challenged statute is "not reasonably restricted to the evil with which it is said to deal." *Butler*, 352 U.S. at 383, 77 S.Ct. at 526.

Over 25 years after *Butler*, in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983), the Supreme Court struck down a federal statute which made it illegal to mail to the public unsolicited materials dealing with contraceptives, venereal disease and family planning. The defendant in *Bolger*, like the defendant in *Butler*, argued that the law should be upheld because it protected minors from materials that their parents might find objectionable. The Supreme Court again unanimously rejected this contention:

> We have previously made clear that a restriction of this scope is more extensive than the Constitution permits, for the government may not "reduce the adult population . . . to reading only what is fit for children." *Butler v. Michigan*, 352 U.S. 380, 383, 77 S.Ct. 524, 526, 1 L.Ed.2d 412 (1957). The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.

463 U.S. at 73, 103 S.Ct. at 2884. *See also Home Box Office v. Wilkinson*, 531 F.Supp. 987 (D.Utah 1982) (statute prohibiting the distribution of sexually explicit materials over cable television declared unconstitutional on grounds of overbreadth).

The level of discourse reaching commercial bookshelves cannot be limited to what might be appropriate for an elementary school library. *See American Booksellers Association, Inc. v. McAuliffe*, 533 F.Supp. 50 (N.D.Ga. 1981); *Tattered Cover v. Tooley*, 696 P.2d 780 (Col.Sup.Ct. 1985); *American Booksellers Association, Inc. v. Superior Court*, 129 Cal.App.3d 197, 181 Cal.Rptr.33 (1982). The state's purpose in passing the challenged amendment, however praiseworthy, cannot be pursued by means which effectively stifle an adult's access to communications he or she is entitled to receive. While the intended effect of the amendment is to prevent examination and perusal by minors of certain "harmful" materials, the unavoidable collateral effect of the law is to severely limit the ability of adults to examine these protected materials. This, in turn, severely limits sales to adults, since the evidence establishes that adults generally become acquainted with these materials, and desire to purchase them, only if they are readily visible.

Faced with the restrictions in the display amendment, a bookstore would be forced either to discontinue carrying the restricted materials, ban minors from its store altogether, or restructure their stores and move a significant portion of its inventory. Due to the wide sweep of the statute, a number of classic literary works, romances, and best sellers would have to be placed behind the counter or into monitored "adults only" areas. As noted earlier, these alternatives are commercially impractical. Moreover, they force adults to use other means (beyond simply browsing through the shelves) to find out about protected literature. Finally, they might also require the adult to go into a stigmatized "adults

only" area to examine the materials; these extra steps would certainly be embarrassing to many adults, and they may very well inhibit many individuals from exercising their right to examine and purchase the material.

The Attorney General suggests that a bookseller may comply with the amendment by simply placing tags on the prescribed books, or by placing them on special "adult only" racks. This interpretation completely ignores the plain language of the new law, which restricts the *display* of the proscribed materials, not simply their perusal. If the proscribed material is on a shelf in an area where juveniles are permitted to roam, then the item is "on display" where the juvenile "may" examine it even if the item is tagged. Indeed, since the material may well have pictures or passages "harmful to minors" on its front or back cover, the law is violated if a person under the age of 18 can simply see it. The amendment makes no provision for tags, adults only racks or blinder racks.

The Attorney General also urges the Court to uphold the challenged display provision as a valid time, place and manner restriction on speech. The "crucial question" in examining a regulation under the time, place and manner test is "whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned v. City of Rockford*, 408 U.S. 104, 116, 92 S.Ct. 2294, 2303, 33 L.Ed.2d 222 (1972). The manner of expression here – the display of the books or other materials – is unquestionably compatible with the activity of the places affected by the regulation – bookstores, art galleries, convenience stores and department stores. Because the amendment does not regulate expression incompatible with the normal activity of

the affected businesses, the amendment here is not a valid time, place and manner restriction.[4]

Moreover, a valid time, place or manner restriction must serve a substantial governmental interest, and it must be drawn with narrow specificity to be no more restrictive of protected communications than necessary.[5] *Grayned v. City of Rockford*, 408 U.S. 104, 116-17, 92 S.Ct. 2294, 2303-04, 33 L.Ed.2d 222 (1972); *Davenport v. City of Alexandria*, 710 F.2d 148 (4th Cir. 1983). While the purpose of the restriction here is to serve a substantial governmental interest, the restriction is far broader than necessary. Without passing upon the constitutionality of any alternative measures, the Court notes that a law simply forbidding the actual perusal by minors of these harmful materials, or at least requiring the use of "blinder racks,"[6]

---

[4] To the extent that the Court in *M.S. News Co. v. Casado*, 721 F.2d 1281 (10th Cir. 1983) held that a somewhat similar Wichita City ordinance was a valid time, place and manner restriction, the Court respectfully disagrees.

[5] Although valid time, place and manner restrictions must generally be content neutral, the Supreme Court has carved out an exception to this general rule where, as here, the restriction is targeted toward a juvenile audience. *See Young v. American Mini Theatres*, 427 U.S. 50, 85-86, 96 S.Ct. 2440, 2459-60, 49 L.Ed.2d 310 (1976) (Justice Stewart, dissenting).

[6] In the *Casado* case, the 10th Circuit upheld the constitutionality of a display ordinance somewhat similar to the regulation before this Court. However, in *Casado*, the challenged ordinance permitted the display of materials "harmful to minors" so long as the materials were kept behind "blinder racks" that covered the lower two-thirds of the material from view.

would be far narrower than the amendment challenged here.[7]

Plaintiffs also challenge the Virginia law on the grounds that it constitutes a prior restraint upon protected speech, and that it unreasonably restricts the access of more mature minors to material which is not obscene as to them. The Court's rulings on plaintiff's overbreadth claim makes it unnecessary to reach the merits of these contentions.

In light of the foregoing, the Court concludes as a matter of law that the 1985 amendment to Virginia Code § 18.2-391(a) is facially invalid for overbreadth. Moreover, it cannot be saved by any narrowing construction. Therefore, the defendants are hereby PERMANENTLY ENJOINED from enforcing the amendment.

An order with be entered in accordance with this opinion.

---

[7] It may be that laws prohibiting the sale of these materials are already the narrowest permissible restrictions, and that displays of such materials are simply a part of the "multitude of external stimuli" in sensitive areas with which parents must cope. *See Bolger*, 463 U.S. at 73, 103 S.Ct. at 2886.

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

AMERICAN BOOKSELLERS ASSOCIATION, et al.,)
)
Plaintiffs,)CIVIL ACTION
)NO. 85-816-A
v.)
)
CHARLES T. STROBEL, DIRECTOR, PUBLIC SAFETY, et. al.,)
)
Defendants.)

ORDER

This matter is before the Court on plaintiffs' application for costs, pursuant to 42 U.S.C. 1988. Defendants have objected to plaintiffs' application and have requested that the fees demanded be reduced. For the reasons stated below, the Court DENIES plaintiff's application and disallows all fees.

The Civil Rights Attorney's Fees Awards Act of 1976 provides that in any action under 42 U.S.C. Section 1983, the district court, "in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. Section 1988. In exercising its discretion, the court is controlled by the standard set forth in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968). Under that standard, a prevailing plaintiff "should ordinarily recover an attorney's fees unless special circumstances would render such an award unjust." 390 U.S. at 402. *See also Bonnes v. Long*, 599 F.2d 1316, 1318 (4th Cir. 1979). In this case, the Court finds just such special circumstances.

This case, *American Booksellers*, was a carefully orchestrated attack on a Virginia statute. The statue at issue made it unlawful to display commercially certain materials deemed harmful to juveniles in such a manner that children could examine and peruse them. *See* Sections 18.2-390 to 390 of the Virginia Code. This statute peculiarly affected one entity, the bookselling industry, and it was that industry that masterminded the assault. Through its attorneys, the industry carefully selected a broad spectrum of litigants to ensure standing. The original plaintiffs included five bookstore trade associations, two individual bookstores and two individual residents of the City of Alexandria. It chose a forum it considered desirable, *i.e.*, one of the more liberal sections of the state, where success at trial was more likely but where actual enforcement of the statute was considerably less likely. And, perhaps most importantly, it filed a 1983 action, even though a declaratory action based on the First Amendment itself would have been more than sufficient. The added attraction of 1983, of course, was the provision for attorneys fees.

When the battle was over and the statute struck down, the beneficiary was, once again, the bookselling industry. With the statute on the books, the industry had faced a massive loss of profits but, through this suit, it managed to protect these revenues. In other words, from the beginning, this case was a suit by a private industry, for a private industry. It is that industry that should now bear the expense, simply as a cost of doing business. To do otherwise would be unfair. The taxpayers should not have to bear the expense of a suit that redounded to the benefit of one industry and one industry alone.

The Court does not mean to suggest that the book-selling industry acted improperly in bringing this case. Nor does it mean to downgrade the importance of this case or the principles it upholds. Freedom of speech and thoughts are of paramount importance and admittedly work to everyone's benefit. However, to the extent that the public benefited, it can pay for that benefit through a one or two cent increase in the price of books. This would effectively spread the cost of the suit and seems more equitable than saddling the State with the bill. The State here acted in good faith, in support of a cause that all must find worthy – the protection of children. Moreover, the State could not have known that its actions would be found to be unconstitutional since this is a novel area of law.

The Court realizes that probably none of these factors standing alone would justify shielding the State from paying attorney fees. For instance, the law is clear that good faith by itself is not a special circumstance that would make an award of attorney fees unjust. *See, e.g., Anderson v. Morris*, 658 F.2d 246 (4th Cir. 1976). However, with all these factors combined, the Court finds it more equitable to let the costs lie where they land. Those who have benefited the most (which includes the book-buying public) will pay the slight cost of that benefit, and the State will not be penalized for its well-intentioned effort to protect its children.

Let the Clerk send a copy of this order to all counsel of record.

DATE: Oct. 23, 1985

/s/ Richard L. Williams
UNITED STATES
DISTRICT JUDGE

APPENDIX 3

AMERICAN BOOKSELLERS ASSOCIATION, INC.; Association of American Publishers; Council for Periodical Distributors Assoc.; International Periodical Distributors Assoc., Inc.; National Assoc. of College Stores, Inc.; Books Unlimited, Inc.; Ampersand Books; Appellees,

v.

COMMONWEALTH OF VIRGINIA, Appellant.

and

Charles T. Strobel; William K. Stover, Defendants.

AMERICAN BOOKSELLERS ASSOCIATION, INC.; Association of American Publishers; Council for Periodical Distributors Assoc.; International Periodical Distributors Assoc., Inc.; National Assoc. of College Stores, Inc.; Books Unlimited, Inc.; Ampersand Books; Appellees,

v.

William K. STOVER, Appellant,

and

Charles T. Strobel, Defendant.

AMERICAN BOOKSELLERS ASSOCIATION, INC.; Association of American Publishers; Council for Periodical Distributors Association; International Periodical Distributors Association, Inc.; National Association of College Stores, Inc.; Books Unlimited, Inc. and Ampersand Books, Appellants,

and

Amy Bush and Jessica Bush, Plaintiffs,

v.

Charles T. STROBEL; William K. Stover and the Commonwealth of Virginia, Appellees.

Nos. 85-1961, 85-1999 and 85-2284.

United States Court of Appeals, Fourth Circuit.

Argued Feb. 5, 1986.

Decided Sept. 30, 1986.

Rehearing and Rehearing In Banc Denied Sept. 26, 1986.

Before PHILLIPS, and SPROUSE, Circuit Judges, and HAYNSWORTH, Senior Circuit Judge.

SPROUSE, Circuit Judge:

This appeal concerns the constitutionality of a 1985 amendment to a Virginia statute which attempts to shield juveniles from the commercial display of sexually explicit material. The defendants, the Commonwealth of Virginia and William K. Stover, Chief of Police for Arlington County, Virginia, appeal from the district court's order declaring unconstitutional the amendment to Virginia Code § 18.2-391(a) and permanently enjoining them from enforcing the amendment.[1] The plaintiffs, the American Booksellers Association, Inc., four other trade associations, and two retail bookstores (hereinafter collectively referred to as the Booksellers) appeal from the district court's denial of attorneys' fees. We affirm the district court's decision that the amendment is unconstitutional, but reverse its denial of plaintiffs' attorneys' fees.

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[1] Charles T. Strobel, Director of Public Safety for the City of Alexandria, Virginia, was named as a defendant in the district court, but has not appealed from that court's judgment.

The pre-amendment statute, for some years, has prohibited the sale to minors of sexually explicit materials defined as harmful to juveniles, including some materials which are not obscene as to adults. The constitutionality of that underlying statute is not in issue in this appeal. The Virginia General Assembly amended the statute, however, effective July 1, 1985, making it unlawful to knowingly display these materials "in a manner whereby juveniles may examine and peruse" them. Va.Code § 18.2-391(a) (Supp.1985).[2] Approximately two weeks after the effective date of the amendment, and prior to

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[2] The amended section 18.2-391(a) provides that:

> It shall be unlawful for any person knowingly to sell or loan to a juvenile, *or to knowingly display for commercial purpose in a manner whereby juveniles may examine and peruse:*
>
> (1) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts sexually explicit nudity, sexual conduct or sadomasochistic abuse and which is harmful to juveniles, or
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> (2) Any book, pamphlet, magazine, printed matter however reproduced or sound recording which contains any matter enumerated in paragraph (1) of this subsection, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sadomasochistic abuse and which taken as a whole, is harmful to juveniles.

(Emphasis supplied to show language added by the 1985 amendment.)

any enforcement action by the defendants, the Booksellers brought this action asserting that the amendment is facially unconstitutional.[3] They sought declaratory and injunctive relief to prevent its enforcement as well as costs and attorneys' fees pursuant to 42 U.S.C. § 1988 (1982). After a hearing on the defendants' motion to dismiss, the district court declared the amendment unconstitutional and enjoined its enforcement.

The Commonwealth and Stover appeal the district court's finding that the Booksellers had standing to attack the amendment and the Commonwealth also appeals that court's ruling that the amendment is facially unconstitutional as violative of the first amendment.

I.

To survive an initial attack challenging standing, a plaintiff must show that an actual controversy exists and must allege a "personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues." *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962). The Commonwealth and Stover contend that the Booksellers have not demonstrated an actual case or controversy. They point out that there has been no proof that the Booksellers have been prosecuted, threatened with prosecution, or have detrimentally changed their behavior as a result of the amendment.

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[3] The action was based on federal constitutional provisions, as well as 42 U.S.C. § 1983 (1982) and 28 U.S.C. §§ 2201 and 2202 (1982).

We agree with the district court that the Booksellers have standing to challenge the amendment. The Booksellers have shown a legitimate concern that the amendment will be implemented so as to infrin e on their first amendment right of "free speech." This is more than a concern merely "held in common by all members of the public." *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 220, 94 S.Ct. 2925, 2931, 41 L.Ed.2d 706 (1974). There is little doubt that compliance with the amendment threatens the Booksellers with economic injury; each of the methods of compliance suggested by the Commonwealth would interfere with the Booksellers' marketing methods. *See Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 152, 90 S.Ct. 827, 829, 25 L.Ed.2d 184 (1970). Additionally, the mere display of proscribed materials in a manner allowing juveniles access violates the statute. To avoid criminal liability, the Booksellers must evaluate the content of all types of printed matter and then prevent minors from having the opportunity to examine and peruse those materials deemed harmful.

If the Booksellers attempt to comply with the amendment, they face economic injury; if the booksellers continue to conduct their business in their normal fashion, they face the prospect of prosecution.[4] Particularly

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[4] The facts of this case distinguish it from our recent decision in *Dow v. Duling*, 782 F.2d 1202 (1986), which challenged on privacy grounds a nineteenth century fornication statute which had not been enforced in private homes for years, if not decades. In the instant case, the amendment is newly enacted. It would be unreasonable to assume that the

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applicable here is the rule that, in order to maintain standing in a first amendment case, a plaintiff does not have to expose himself to prosecution when a statute imposes a criminal penalty. When the threat of prosecution is not chimerical, it is sufficient that he claims that the statute deters the exercise of constitutionally protected rights. *Steffel v. Thompson*, 415 U.S. 452, 459, 94 S.Ct. 1209, 1215, 39 L.Ed.2d 505 (1974).[5]

In short, we find that the Booksellers meet the requirements for standing in this case.

II.

Turning to the underlying first amendment issue, there is no question that a state government has an

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General Assembly adopted the 1985 amendment without intending that it be enforced. Additionally, this is a first amendment case. In the context of threats to the right of free expression, courts justifiably often lessen standing requirements. As the Supreme Court said in a recent discussion of this issue, in first amendment cases "the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged." *Secretary of State of Maryland v. J.H. Munson Co.*, 467 U.S. 947, 104 S.Ct. 2839, 2847, 81 L.Ed.2d 786 (1984). *See Upper Midwest Booksellers Assoc. v. City of Minneapolis*, 780 F.2d 1389, 1391 n. 5 (8th Cir.1985).

[5] The Commonwealth also attacks the standing of the various trade associations to sue as representatives of their member retail and wholesale businesses. The prerequisites for associational standing set forth in *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 342-43, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977) are present in this case, and we see no merit to this aspect of the Commonwealth's argument.

interest in shielding minors from some sexually explicit materials which are not considered obscene as to adults. *Ginsberg v. New York*, 390 U.S. 629, 638, 88 S.Ct. 1274, 1279, 20 L.Ed.2d 195 (1968). The *Ginsberg* Court upheld a New York law prohibiting the sale to minors of sexually explicit materials which were defined as harmful to juveniles. The pre-amendment Virginia statute was modeled after the statute sanctioned in *Ginsberg*.[6] The Booksellers, however, do not attack the constitutionality of the pre-amendment statute. They assert, instead, that the display provision of the amendment will unreasonably restrict adult access to materials protected under the first amendment. *See American Booksellers Association, Inc. v. McAuliffe*, 533 F.Supp. 50, 56 (N.D.Ga.1981).

The Commonwealth concedes that adults' first amendment rights cannot be limited by the restrictive obscenity standards which may be applied to juveniles. *Butler v. Michigan*, 352 U.S. 380, 77 S.Ct. 524, 1 L.Ed.2d 412 (1957).[7] It contends, nevertheless, that the stricter

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[6] The General Assembly modified the definition of materials considered harmful to juveniles to parallel the obscenity standards detailed in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973).

[7] We also question whether an older minor's first amendment rights can be limited by the standards applicable to younger juveniles. "[M]inors are entitled to a significant measure of First Amendment protection" and the government may restrict these rights "only in relatively narrow and well-defined circumstances." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-13, 95 S.Ct. 2268, 2274, 45 L.Ed.2d 125 (1975). These restrictions are justified when a child is not possessed of a full capacity for individual choice, and, in assessing that

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standards of the amendment's display provision can be applied so as to screen juveniles from potentially harmful material without infringing on the rights of adults to have access to the same sexually explicit material. It argues that the district court erred when it found that the statute under review does not accommodate the state's interest in protecting juveniles in the least restrictive fashion and that the amendment is facially overbroad.

A court will not find a statute facially invalid unless: (1) it cannot easily be given a narrowing construction; and (2) it has both a real and substantial deterrent effect on protected expression. *Erznoznik*, 422 U.S. at 216, 95 S.Ct. at 2276. The Commonwealth urges that narrowing constructions were readily available to the district court. Specifically, it asserts that the prohibited materials can still be stocked by the Booksellers so long as the materials are displayed in a manner whereby juveniles cannot examine and peruse them.

The Commonwealth asserts that the amendment is a valid time, place, and manner regulation such as the zoning ordinance upheld in *Young v. America Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976). While it is true that the Supreme Court has upheld reasonable time, place, and manner restrictions, the speech so regulated either occurred in the public forum or was

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capacity, the age of the minor is a significant factor. *Id.* at 214 n. 11, 95 S.Ct. at 2275 n. 11. While the preamendment statute allowed retailers to consider a minor's relative maturity in deciding whether to sell a particular item to him, the current statute's display provision is not susceptible to such a selective application.

subject to a general zoning ordinance. *Clark v. Community for Creative Nonviolence*, 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984); *Young*, 427 U.S. 50, 96 S.Ct. 2440. The state's interest in regulating activities in public places is, of course, of a somewhat different character than its interest in what goes on in a private bookstore. Even under the time, place, and manner analysis, however, the amendment must fall because the governmental interest asserted in this type of regulation must not involve the content of the regulated speech. *Clark*, 468 U.S. 288, 104 S.Ct. at 3065. There is no question that the Virginia amendment imposes restrictions based on the content of publications.

The amendment's most serious flaw, however, is its breadth. A demonstrably overbroad regulation may act as a deterence to the exercise of constitutionally protected rights. *Erznoznik*, 422 U.S. at 216. In the instant case, the amendment's language is broad, and it does not provide any potential defenses or methods of compliance.[8] The Commonwealth, nonetheless, asserts that compliance with the amendment would not deter the exercise of first

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[8] As we note, *infra*, we disagree with the rationale of some cases which hold that otherwise constitutionally offensive "display" provisions can be legitimized by specifying certain restrictive display methods as being acceptable under the statute. Technically, however, the ordinance upheld in *M.S. News Co. v. Casado*, 721 F.2d 1281 (10th Cir.1983), is distinguishable from the Virginia statute which we review in that it specifically provides that material kept behind "blinder racks" was not deemed to have been "displayed." Similarly, retailers were able to comply with the ordinance in *Upper Midwest Booksellers*, 780 F.2d 1389, by placing the materials behind opaque covers, in sealed wrappers, or in "adults only" settings.

amendment rights. It stresses that only a small percentage of the inventory in book stores could be classified as harmful to juveniles and argues that retail outlets can readily modify their display methods to comply with the amendment. Because of its recent passage, no one has yet been prosecuted under the Virginia amendment. Additionally, there was little specific evidence presented below, making it difficult to determine what percentage of materials in a given retail outlet might be subject to the amendment's restrictions.[9] It cannot be gainsaid, however, that book retailers face a substantial problem attempting to comply with the amendment in ordering, reviewing, and displaying publications for sale. *See American Booksellers Association, Inc. v. Webb*, 590 F.Supp. 677, 692-93 (N.D.Ga.1984).

The Commonwealth suggests a number of ways by which the book retailer may solve these problems, but none appears to us to significantly ease the first amendment burden created by the amendment. The display methods suggested by the Commonwealth appear either insufficient to comply with the amendment or unduly burdensome on the first amendment rights of adults, and, to this extent, we disagree with the rulings in *M.S. News* and *Upper Midwest Booksellers*. Placing "adults only" tags

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[9] The district court heard testimony from three witnesses in order to "flesh out" the pleadings and provide a more complete record. The bookstore owners testified that they felt between 30 and 50% of their inventory was covered by the display provision. The Commonwealth argues that only a "minuscule percentage" of the plaintiffs' inventory would be involved. The district court found that a significant percentage of the inventory of the average general bookstore, varying between 5 and 25%, falls within the amendment's restrictions.

on books and magazines or displaying the restricted material behind blinder racks or on adults only shelves freely accessible in the main part of the store would not stop any determined juvenile from examining and perusing the materials. The statute requires that such materials not be displayed so that minors *may* have access to them. Forcing a bookseller to create a separate, monitored adults only section requiring that the materials be sealed or taking the materials off display and keeping them "under the counter" unreasonably interferes with the booksellers' right to sell the restricted materials and the adults' ability to buy them. Many adults, for a variety of reasons, would not enter a display area identified as "for adults only." Selling materials in sealed wrappers or from under the counter would unrealistically limit access by adults and would significantly interfere with the Booksellers' business practices. Contrary to the Commonwealth's argument that the scienter requirement in the statute allows a book retailer to avoid the hazards of self censorship, each of these suggested practices would require the seller to read and make a content based judgment on each item on his shelves in order to select the ones requiring special treatment. More importantly, a retailer cannot rely on the amendment to guide him in deciding what are the least restrictive modifications in display methods which would be sufficient to satisfy the statute.

In sum, we feel that the amendment discourages the exercise of first amendment rights in a real and substantial fashion, and that it is not readily subject to a narrowing interpretation so as to withstand an overbreath

challenge. We, therefore, affirm the district court's judgment declaring the challenged amendment unconstitutional and enjoining its enforcement.

III.

The Booksellers appeal the district court's denial of their application for attorneys' fees pursuant to 42 U.S.C. § 1988. The prevailing party in a § 1983 action should ordinarily recover attorneys' fees absent special circumstances which would render the award unjust. *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968). The district court's normally broad discretion in this area is narrowly limited both by the reasoning of *Newman* and by Congress' later explicit approval of that standard in enacting the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988. *Bonnes v. Long*, 599 F.2d 1316, 1318 (4th Cir.1979). In denying the plaintiffs' application, the district court noted that the Booksellers could pass on the cost of litigation to their customers in the form of higher prices, that the Commonwealth acted in good faith, and that the Booksellers were the primary beneficiaries of the action striking down the statute. The court recognized that none of these factors alone would constitute the necessary special circumstance to justify denial of attorneys' fees. It held, however, that "with all these factors combined, the Court finds it more equitable to let the costs lie where they land." The district court cited no authority for the action, and we find none.

Although the Booksellers certainly benefit from the results of this litigation, the citizens of Virginia will likewise continue to enjoy unfettered freedom of expression. We do not find it unjust that the taxpayers will have to bear the costs of the award. *Johnson v. State of Mississippi*, 606 F.2d 635, 637 (5th Cir.1979).

As to defendants Strobel and Stover, however, we feel that circumstances would make the award of attorney fees against them unjust. At the time of their involvement there was, of course, no court interpretation concerning the constitutionality of the Virginia statute. Their actions were pursuant to a duly enacted state statute, and when they were named as defendants, they did not defend the statute on its merits as did the intervening Commonwealth.

In view of the above, the district court's denial of attorney fees is reversed insofar as it related to the Commonwealth of Virginia, and is remanded to the district court with instructions to assess attorney fees against the Commonwealth. The district court's decision denying attorney fees against defendants Strobel and Stover is affirmed.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

APPENDIX 4

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1961
No. 85-1999
No. 85-2284

(Filed Sept. 26, 1986)

American Booksellers Association, Inc., et al,

Appellees,

versus

Commonwealth of Virginia, et al,

Appellants.

and

Charles T. Strobel, et al,

Defendants.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Richard L. Williams, District Judge.

The appellant's petition for rehearing and suggestion for rehearing in banc is denied by a panel consisting of Judges Phillips, Sprouse and Haynsworth.

In a requested poll of the Court on the suggestion for rehearing in banc, Judges Widener, Russell, Chapman and Wilkins voted in favor of rehearing in banc; and Judges Winter, Hall, Phillips, Murnaghan, Sprouse and Ervin voted against rehearing in banc. Judge Wilkinson noted he was disqualified. The majority of the Judges having voted against rehearing in banc, it is ordered that rehearing in banc is denied.

Entered at the direction of Judge Sprouse for a panel consisting of Judges Phillips, Sprouse and Haynsworth.

For the Court,
/s/ John M. Greacen
Clerk

APPENDIX 5

SUPREME COURT OF THE UNITED STATES

No. 86-1084

VIRGINIA, APPELLANT *v.* AMERICAN BOOKSELLERS ASSOCIATION, INC., ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[January 25, 1988]

JUSTICE BRENNAN delivered the opinion of the Court.

The courts below declared unconstitutional the following Virginia statute: "It shall be unlawful for any person . . . to knowingly display for commercial purpose in a manner whereby juveniles may examine and peruse" visual or written material that "depicts sexually explicit nudity, sexual conduct or sadomasochistic abuse and which is harmful to juveniles." Va. Code § 18.2-391(a) (Supp. 1987). The unique factual and procedural setting of this case leads us to conclude that an authoritative construction of the Virginia statute by the Virginia Supreme Court would substantially aid our review of this constitutional holding, and might well determine the case entirely. Accordingly, we certify two questions to the Virginia Supreme Court.[1]

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[1] Rule 5:42(a) of the Rules of Virginia Supreme Court states:

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I

In 1968, this Court held constitutional a state prohibition on the sale to those under 17 of materials deemed "harmful to juveniles." *Ginsberg v. New York*, 390 U.S. 629, 643 (1968). The next year, Virginia enacted a similar statute. The Virginia Code's current definition of "harmful to juveniles" is a modification of the *Miller* definition of obscenity, adapted for juveniles. *Miller v. California*, 413 U.S. 15, 24 (1973). The statute reads, in relevant part,

> " 'Harmful to Juveniles' means that quality of any description or presentation, in whatever

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"*Power To Answer.* – The [Virginia] Supreme Court may in its discretion answer questions of law certified to it by the Supreme Court of the United States, a United States court of appeals for any circuit, a United States district court, or the highest appellate court of any state or the District of Columbia. Such answer may be furnished, when requested by the certifying court, if a question of Virginia law is determinative in any proceeding pending before the certifying court and it appears there is no controlling precedent on point in the decisions of the Supreme Court or the Court of Appeals of Virginia."

This opinion, along with a statement to be appended by Clerk of the Court setting out the names, addresses, and telephone numbers of counsel for the parties and the names of each of the parties involved, shall constitute the certification order. Va. Sup. Ct., Rule 5:42(d). The Clerk of the Court shall also transmit to the Virginia Supreme Court the record in this case, including plaintiffs' exhibits and the trial transcript. Appellant shall bear the fees and costs on certification in the Supreme Court of Virginia. Va. Sup. Ct. Rule 5:42(g). Such fees and costs shall be taxable items pursuant to Rule 50 of the Rules of this Court. Virginia's certification procedure became effective on April 1, 1987, and hence was unavailable to the courts below.

> form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it (a) predominately appeals to the prurient, shameful or morbid interest of juveniles, (b) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for juveniles, and (c) is, when taken as a whole, lacking in serious literary, artistic, political or scientific value for juveniles." Va. Code § 18.2-390(6) (1982).

In 1985, Virginia amended its law to make it also a crime "to knowingly display for commercial purpose in a manner whereby juveniles may examine and peruse" the aforementioned materials, even if these materials are not actually sold to any juvenile.[2]

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[2] The law, with the 1985 amendment italicized, reads as follows:

"Definitions. – As used in this Article:

"(1) 'Juvenile' means a person less than eighteen years of age.

[Subsections (2)-(5) define "Nudity," "Sexual conduct, "Sexual excitement," and "Sadomasochistic abuse," respectively.]

"(6) 'Harmful to Juveniles' means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it (a) predominately appeals to the prurient, shameful or morbid interest of juveniles, (b) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for juveniles, and (c) is, when taken as a whole, lacking in serious literary, artistic, political or scientific value for juveniles.

"(7) 'Knowingly' means having general knowledge of, or reason to know, or a belief or ground for belief which warrants

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Plaintiffs made a facial challenge to the 1985 amendment in the United States District Court for the Eastern District of Virginia.[3] They asserted that the 1985

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further inspection or inquiry of both (a) the character and content of any material described herein which is reasonably susceptible of examination by the defendant, and (b) the age of the juvenile, provided however, that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such juvenile." Va. Code § 18.2-390 (1982).

Va. Code § 18.2-391 (Supp. 1987) reads:

"Unlawful acts. – (a) It shall be unlawful for any person knowingly to sell or loan to a juvenile, *or to knowingly display for commercial purpose in a manner whereby juveniles may examine or peruse:*

"(1) Any picture, photography, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts sexually explicit nudity, sexual conduct or sadomasochistic abuse and which is harmful to juveniles, or

"(2) Any book, pamphlet, magazine, printed matter however reproduced or sound recording which contains any matter enumerated in subdivision (1) of this subsection, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sadomasochistic abuse and which taken as a whole, is harmful to juveniles.

* * *

"(e) Violation of any provision hereof shall constitute a Class 1 misdemeanor."

[3] Plaintiffs below included a number of organizations with memberships consisting of national and Virginia booksellers, two Virginia bookstores, and a Virginia adult and her juvenile

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amendment was fundamentally different than the prior statute in that it burdens the First Amendment rights of adults, as to whom at least some of the covered works are not obscene. They argued that, while the *sale* provision does not affect adult access to covered works in any significant way, as the Court held in *Ginsberg*, *supra* at 634-635, the 1985 amendment, governing the *display* of such works to minors, substantially restricts access to adults because of the economically devastating and extremely restrictive measures booksellers must adopt to comply. Specifically, they argued compliance requires a bookseller to: (1) create an "adults only" section of the store; (2) place the covered works behind the counter (which would require a bookbuyer to request specially a work); (3) decline to carry the materials in question; or (4) bar juveniles from the store.[4] Plaintiffs maintained that because bookbuyers generally make their selections by

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child. The District Court dismissed the parent and child for failure to allege potential prosecution under the 1985 amendment, a potential economic injury flowing therefrom, or "anything more than an abstract interest in the availability of reading materials in bookstores, an interest which is no different from the interests of all other local citizens who patronize bookstores." *American Booksellers Assn.* et al. v. *Strobel*, 617 F. Supp. 699, 704 (ED Va 1985). The remaining plaintiffs are the appellees here.

[4] There are a number of different types of booksellers in Virginia. Some are traditional bookstores owners. Others include, for example, grocery store owners, drug store owners, and airport convenience store owners who have one or more book or magazine racks. The ability of these diverse types of booksellers to utilize the differing methods of compliance varies.

browsing through displayed books, and because adults would be reluctant to enter an "adults only" store or section of a store, the statute effectively restricts the entire population's access to books that fall within its purview. In effect, argued plaintiffs, the law reduces the adult population to reading and viewing only works suitable for children, something this Court has repeatedly held is prohibited by the First Amendment. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 73-74 (1983); *Butler v. Michigan*, 352 U.S. 380, 383-384 (1957). Consequently, they asserted, the law must undergo First Amendment scrutiny. Applying that scrutiny, plaintiffs reasoned that the law is unconstitutional because the State's interest in restricting the display of these works is insubstantial and the law does not further this interest by the least restrictive means available. In support of that proposition, plaintiffs argued that the statute criminalizes that mere *display* of covered works, even if there is no evidence that a juvenile would *actually* examine and peruse them.

Plaintiffs also maintained that the law is overbroad in that it restricts access by mature juveniles to works that are "harmful" only to younger children. Finally, the statute is purported to be unconstitutionally vague, in part because it is allegedly impossible to determine what standard should be used in deciding whether a work is appropriate for juveniles of different ages and levels of maturity.[5]

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[5] Plaintiffs argued that these problems do not arise in the context of the original statute, which regulates only the *sale* of

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Plaintiffs brought suit under 42 U.S. § 1983 against the Arlington County Chief of Police. Pursuant to 28 U.S.C. § 2403(b), the Virginia Attorney General intervened. The defendants argued that the 1985 amendment is a necessary corollary to the prior sales restriction, as one without the other is useless. Defendants also challenged plaintiffs' reading of the statute's reach, arguing that it extends only to "borderline obscenity." Further, compliance with the statute may be achieved, they maintained, by placing distinctive tags on the restricted materials, or placing them behind "blinder racks." Therefore, they asserted the statute has no significant "spillover" effect on adults, and any effect there might be is permissible under a "time, place or manner" test. Even under strict First Amendment scrutiny, they argued, the 1985 amendment is constitutional due to the State's compelling interest in protecting juveniles and the lack of a less restrictive alternative to achieve effectively that interest.

Plaintiffs moved for a preliminary injunction, and defendants moved to dismiss or abstain. At the preliminary injunction hearing, which became a trial on the merits, plaintiffs called three witnesses: Two booksellers (the owners of the two plaintiff bookstores) and the general counsel of plaintiff American Booksellers Association. The two booksellers testified that their stores were typical in most respects of non- "adults only" general-subject bookstores in the State. The booksellers

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certain materials. According to plaintiffs and the Court of Appeals, at the point of *sale* a bookseller can make an individualized determination as to the suitability of a specific item for a specific child. 802 F.2d 688, 693-694, n. 7 (CA4 1986).

introduced as exhibits a total of 16 books that they believed were examples of books the amended statute covered, and testified that the law might apply to as much as one half of their inventory. The exhibits were extremely diverse, including classic literature, health texts, poetry, photography, and pot-boiler novels. Finally, all three witnesses testified as to the steps they believed a bookseller would have to take to conform to the statute, repeating the four options discussed above. On cross-examination, defendants elicited testimony from the bookstore owners that they were unfamiliar with the portion of the law defining "harmful to juveniles." Therefore, defendants submitted that the plaintiffs' witnesses were testifying under a mistaken impression as to the statute's coverage.

The trial court denied the State's motion to dismiss the case and declined to abstain. On the merits, it held as a factual matter that the statute would cover between 5 and 25 percent of a typical bookseller's inventory. Further, the court agreed with plaintiffs as to the alternatives available to comply with the law, rejecting defendants' suggestion that a bookseller could avoid criminal prosecution by merely tagging the materials or placing them behind "blinder" racks. The court reasoned from this that the 1985 amendment placed significant burdens on adult First Amendment rights by restricting adult access to nonobscene works. It concluded that the 1985 amendment was overbroad, and permanently enjoined its enforcement.

The Court of Appeals for the Fourth Circuit affirmed. 802 F. 2d 691 (1986). While critical of the evidentiary basis for the determination, the court neither accepted nor

rejected expressly the District Court's finding as to the scope of the statute. *Id.*, at 696. At the same time, however, the court stated that "[i]t cannot be gainsaid" that book retailers would face significant difficulty attempting to comply with the statute. The Court of Appeals, like the District Court, adopted plaintiffs' theory as to the acceptable modes of compliance with the statute and rejected the Attorney General's alternatives, reasoning that tagging the materials or placing them behind blinder racks would not, as a practical matter, deter juveniles from examining and perusing the works. The court questioned whether treating all juveniles identically was constitutional, but did not determine the issue.

The State appealed to this Court, alleging a conflict among the Courts of Appeals. See *Upper Midwest Booksellers Assn. v. Minneapolis*, 780 F. 2d 1389 (CA8 1985) (holding a similar ordinance constitutional), and *M.S. News Co. v. Casado*, 721 F. 2d 1281 (CA10 1983) (same). We noted probable jurisdiction. 479 U.S. ___ (1987).

II

We first address plaintiffs' standing to bring suit. The State argued before the District Court that plaintiffs lacked standing to bring a pre-enforcement facial challenge, alleging that plaintiffs did not suffer sufficient harm, and what harm they did suffer was economic, not speech related. Further, the State argued that plaintiffs' challenge was premature, having been made before the statute became effective.

To bring a cause of action in federal court requires that plaintiffs establish at an irreducible minimum an

injury in fact; that is, there must be some " 'threatened or actual injury resulting from the putatively illegal action . . . .' " *Warth v. Seldin*, 422 U.S. 490, 499 (1975), quoting *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 (1973); see also *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 151-154 (1970). That requirement is met here, as the law is aimed directly at plaintiffs, who, if their interpretation of the statute is correct, will have to take significant and costly compliance measures or risk criminal prosecution. See *Craig v. Boren*, 429 U.S. 190, 194 (1976); *Doe v. Bolton*, 410 U.S. 179, 188 (1978).

Even if an injury in fact is demonstrated, the usual rule is that a party may assert only a violation of its own rights. However, in the First Amendment context, " '[l]itigants [] are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.' " *Secretary of State of Maryland v. J.H. Munson Co.*, 467 U.S. 947, 956-957 (1984), quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). This exception applies here, as plaintiffs have alleged an infringement of the First Amendment rights of bookbuyers.[6]

We are not troubled by the pre-enforcement nature of this suit. The State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise. We conclude that plaintiffs have

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[6] The complaint also alleged a violation of plaintiffs' own First Amendment right to display the restricted works, but that claim was not passed on below and is not pressed here.

alleged an actual and well-founded fear that the law will be enforced against them. Further, the alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution.

III

We have concluded that we should not attempt to decide the constitutional issues presented without first having the Virginia Supreme Court's interpretation of key provisions of the statute. Several factors combine in a unique way to counsel that course.

At oral argument the State's attorney[7] conceded that if the statute is read as plaintiffs contend, not only is it unconstitutional but its enforcement *should*, as a normative matter, be enjoined. Indeed, he seemingly conceded that if any of the books introduced as plaintiffs' exhibits below is covered by the statute, plaintiffs should prevail.[8]

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[7] The term "State's attorney" refers to Mr. Smith, the Assistant Attorney General who argued the case.

[8] After noting that plaintiffs have asserted that the statute covers the broad range of works represented by their exhibits below, the State's attorney said:

"If the range is correct, if they are correct that this amendment involves that material, then we lose the case, and I submit to the Court that we *should* lose the case, because the Commonwealth of Virginia does not desire to restrict in any way, directly or indirectly, that type of material.

* * *

"I will wager this case on one exhibit, Plaintiff's Exhibit Number 4, The Penguin Book of Love Poetry. *If that book falls*

(Continued on following page)

However, the State argues that the statute's coverage is much narrower than plaintiffs allege or the courts below found." It contends that the statute covers only a very few "borderline" obscene works, and none of the exhibits introduced by plaintiffs.[9]

There was testimony below that if the coverage of the statute is as narrow as the State argues, it would reach less than a single shelf of a typical bookseller's wares. App. 222. If that is true, methods of compliance exist that are substantially less burdensome than those discussed by the lower courts. For example, as is currently done in one of the plaintiff bookstores, a single shelf containing restricted books can be located within sight of the bookseller. If a juvenile examines or peruses the materials, an employee can prevent his continuing to do so. App. 207. This is not to say that the law might not still raise substantial constitutional questions. However, the nature of the First Amendment "spillover" burden to adults would be dramatically altered.

(Continued from previous page)

within this statute, then we concede the case. You don't have to look at all of them. Just look at that one book. Or if you want to look at all of them, *the same thing goes for all of them. . . .*" Tr. of Oral Arg. 4, 19, (emphasis added).

[9] We note that in her brief to the Court of Appeals, the Attorney General conceded, or appeared to concede, that one of the exhibits, Hollywood Wives, would be covered. Opening Brief for Appellant Commonwealth of Virginia in Nos. 85-1961(L), 85-1999, pp. 27-28. At oral argument before this Court, that apparent concession was disclaimed. Tr. of Oral Arg. 5.

Plaintiffs, pointing to the lower courts' interpretation of the law, paint a strikingly different picture. They see the statute as a broad enactment, potentially applying to a huge number of works. This is not a law, they say, covering only "borderline obscenity," but rather a device expunging from display up to a quarter of the books available to juveniles and, as a practical matter, to adults. The courts below similarly regarded the coverage; for a law, like Virginia's, that applies to up to 25 percent of a typical bookstore's inventory (as the District Court held) or that would confront booksellers with a "substantial problem" of compliance (as the Court of Appeals stated) must extend beyond only the nearly obscene. This broader reading of the statute would raise correspondingly greater First Amendment questions.

This Court rarely reviews a construction of state law agreed upon by the two lower federal courts. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985). However, this case presents the rare situation in which we cannot rely on the construction and findings below. There is no reliable evidence in the record supporting the District Court's holding that the statute reaches up to 25 percent of a typical bookstore, since the two bookstore owners who testified were unfamiliar with the statutory definition of "harmful to minors." We cannot tell whether the court's finding was based on an independent determination by the District Judge, as plaintiffs suggest, or the flawed testimony. But even if the holding were based on the former, we cannot discern the evidentiary basis for it. Neither can we rely on the Court of Appeals' construction. That court criticized the basis of the District Court's

holding, but gave no alternative basis for its own determination. Given this history we are reluctant to adopt without question the lower courts' interpretation of state law. At the same time, as the Attorney General does not bind the state courts or local law enforcement authorities, we are unable to accept her interpretation of the law as authoritative.

Under these unusual circumstances, where it appears the State will decline to defend a statute if it is read one way and where the nature and substance of plaintiffs' constitutional challenge is drastically altered if the statute is read another way, it is essential that we have the benefit of the law's authoritative construction from the Virginia Supreme Court. Certification, in contrast to the more cumbersome and (in this context) problematic abstention doctrine, is a method by which we may expeditiously obtain that construction. See *Bellotti v. Baird*, 428 U.S. 132 (1976) (remanding with instructions to certify questions pertaining to construction of a state statute that was susceptible to multiple interpretations, one of which would avoid or substantially modify a federal constitutional challenge). Consequently, we shall resort to its certification Rule 5:42 to ask the Virginia Supreme Court whether any of the books introduced by plaintiffs as exhibits below fall within the scope of the amended statute, and how such decisions should take into account juveniles' differing ages and levels of maturity.

We will also certify a second question. At oral argument, in response to a question from the Bench, the State's attorney declared that a bookseller will not be subject to criminal prosecution if, as a matter of store policy, the bookseller prevents a juvenile observed

reviewing covered works from continuing to do so, even if the restrictive materials are not segregated.[10] If this is what the statute means, the burden to the bookseller, and the adult bookbuying public, is significantly less than that feared and asserted by plaintiffs. (Even if the statute means that the bookseller is required to announce or manifest the store's policy, perhaps by appropriate signs in the store or other reasonable measures, the burdens might be less than under plaintiffs' construction.)

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[10] The following colloquy occurred at oral argument:

"QUESTION: Mr. Smith, suppose a bookseller does not segregate books. Would he be able to comply with the Virginia statute by simply saying, whenever I see a juvenile, a person who looks to me like a juvenile, browsing in a book which is a book that I ought to know falls within this statute, I stop that juvenile and ask him to leave the store. That is my store policy.

"*Would that be enough to comply with the statute?*

"MR. SMITH: Yes sir.

"QUESTION: . . . I am talking about the language display for a commercial purpose in a manner whereby juveniles may examine and peruse. 'May.'

"MR. SMITH: Because I think –

"QUESTION: 'May' means it is possible for them to do so or they are permitted to do so.

"MR. SMITH: This Court had a case which I have cited in my brief called the Foreign Products Case, and that case said that when used in a statute as this 'May' is used it can mean might or it can mean reasonable certainty or it can mean actual tendency under Virginia law, since it has to be strictly construed against the Commonwealth, *it has to be what you have suggested, and it would qualify.*" Tr. of Oral Arg. 51-52 (emphasis added).

It has long been a tenet of First Amendment law that in determining a facial challenge to a statute, if it be "readily susceptible" to a narrowing construction that would make it constitutional, it will be upheld. *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). The key to application of this principle is that the statute must be "readily susceptible" to the limitation; we will not rewrite a state law to conform it to constitutional requirements.

It is not necessary in this case, however, to decide whether the statute is readily susceptible of the Attorney General's current interpretation. The situation we confront is unusual. Another question is already being certified, enforcement of the statute will remain enjoined throughout the certification process, and no state court has ever had the opportunity to interpret the pertinent statutory language. In these circumstances, there is some advantage and no cost, either in terms of the First Amendment chilling effect or unnecessary delay, to certifying a proffered narrowing construction that is neither inevitable nor impossible. Thus, we certify this second question.[11]

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[11] The constitutional issues relating to the display of visual materials (Va. Code § 18.2-391(a)(1) (Supp. 1987) are potentially different from those relating to the display of written works (§ 18.2-391(a)(2) (Supp. 1987)). However, we believe that answers to the certified questions will substantially aid us in resolving both inquiries.

IV

Pursuant to Rule 5:42 of the Virginia Supreme Court, we respectfully certify to that court the following questions:

> 1. Does the phrase "harmful to juveniles" as used in Virginia Code §§ 18.2-390 and 18.2-391 (1982 and Supp. 1987), properly construed, encompass any of the books introduced as plaintiffs' exhibits below, and what general standard should be used to determine the statute's reach in light of juveniles' differing ages and levels of maturity?
>
> 2. What meaning is to be given to the provision of Virginia Code § 18.2-391(a) (Supp. 1987) making it unlawful "to knowingly display for commercial purpose in a manner whereby juveniles may examine or peruse" certain materials? Specifically, is the provision complied with by a plaintiff bookseller who has a policy of not permitting juveniles to examine and peruse materials covered by the statute and who prohibits such conduct when observed, but otherwise takes no action regarding the display of restricted materials? If not, would the statute be complied with if the store's policy were announced or otherwise manifested to the public?

It is so ordered.

JUSTICE STEVENS, concurring in part and dissenting in part.

A matter as important as the constitutionality of a state statute should not be decided on the basis of an advocate's concession during oral argument in this Court. The Assistant Attorney General was certainly correct when he conceded that a statutory restriction on the

commercial display of *The Penguin Book of Love Poetry* would be unconstitutional, but it is less clear than *none* of the 16 exhibits introduced by the plaintiffs could be subjected to the statutory prohibition. Moreover, the colloquy that is partially quoted in n.8, *ante* at p. 9, is neither entirely unambiguous nor equivalent to a formal commitment by the State to dismiss the appeal if the Virginia Supreme Court advises us that one or more of the exhibits is covered by the statute. I would therefore modify the first certified question to ask the state court which, if any, of the plaintiff's exhibits is covered by the statute. Because the arguable literary, artistic, or scientific value of the exhibits varies widely, as does the character of the sexual references in the different books, an answer to the question I would ask would be of great help in understanding the reach of the statute and evaluating its validity. Accordingly, while I am in substantial agreement with what the Court has written, I respectfully dissent from the Court's refusal to ask the question that I have proposed.

APPENDIX 6

COMMONWEALTH of Virginia

v.

AMERICAN BOOKSELLERS ASSOCIATION, INC., et al.

Record No. 880090.

Supreme Court of Virginia.

Sept. 23, 1988.

Present: All the Justices.

RUSSELL, Justice.

We here construe the 1985 amendment to Code § 18.2-391, which makes it a misdemeanor knowingly to display material "harmful to juveniles" in a manner whereby juveniles may examine and peruse it. Pursuant to our Rule 5:42, the Supreme Court of the United States, on January 25, 1988, certified to this Court the following questions of Virginia law:

> 1. Does the phrase "harmful to juveniles" as used in Virginia Code §§ 18.2-390 and 18.2-391 (1982 and Supp. 1987), properly construed, encompass any of the books introduced as plaintiffs' exhibits below, and what general standard should be used to determine the statute's reach in light of juveniles' differing ages and levels of maturity?
>
> 2. What meaning is to be given to the provision of Virginia Code § 18.2-391(a) (Supp.1987) making it unlawful "to knowingly display for commercial purpose in a manner whereby juveniles may examine or peruse" certain materials? Specifically, is the provision complied with by a

> plaintiff bookseller who has a policy of not permitting juveniles to examine and peruse materials covered by the statute and who prohibits such conduct when observed, but otherwise takes no action regarding the display of restricted materials? If not, would the statute be complied with if the store's policy were announced or otherwise manifested to the public?

We accepted the certification by order entered February 4, 1988.

I. HISTORY AND PROCEEDINGS

In 1968, the Supreme Court decided *Ginsberg v. New York*, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968), upholding a New York statute which prohibited the sale to minors of certain material which fell short of "obscenity" as then defined, but which was nevertheless deemed "harmful to juveniles." Our General Assembly responded in 1970 by enacting Code §§ 18.2-390 and 391, which are similar to the New York laws held constitutional in *Ginsberg*. In 1975, the General Assembly amended the definition of "harmful to juveniles" contained in Code § 18.2-390(6) to comport with the Supreme Court's holding in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973).

In 1985, the General Assembly enacted the amendment here under consideration which added certain language to Code § 18.2-391. The two relevant statutes, with emphasis given to the language added in 1985, now read as follows:

Code § 18.2-390

Definitions.–As used in this article:

(1) *"Juvenile"* means a person less than eighteen years of age.

(2) *"Nudity"* means a state of undress so as to expose the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered or uncovered male genitals in a discernibly turgid state.

(3) *"Sexual conduct"* means actual or explicitly simulated acts of masturbation, homosexuality, sexual intercourse, or physical contact in an act of apparent sexual stimulation or gratification with a person's clothed or unclothed genitals, pubic area, buttocks or if such be female, breast.

(4) *"Sexual excitement"* means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(5) *"Sadomasochistic abuse"* means actual or explicitly simulated flagellation or torture by or upon a person who is nude or clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(6) *"Harmful to juveniles"* means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it (a) predominately appeals to

the prurient, shameful or morbid interests of juveniles, (b) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for juveniles, and (c) is, when taken as a whole, lacking in serious literary, artistic, political or scientific value for juveniles.

(7) "Knowingly" means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both (a) the character and content of any material described herein which is reasonably susceptible of examination by the defendant, and (b) the age of the juvenile, provided however, that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such juvenile.

Code § 18.2-391

UNLAWFUL ACTS.–(a) It shall be unlawful for any person knowingly to sell, rent or loan to a juvenile, *or to knowingly display for commercial purpose in a manner whereby juveniles may examine and peruse:*

(1) Any picture, photography, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts sexually explicit nudity, sexual conduct or sado-masochistic abuse and which is harmful to juveniles, or

(2) Any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains

any matter enumerated in subdivision (1) of this subsection, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sadomasochistic abuse and which, taken as a whole, is harmful to juveniles.

(b) It shall be unlawful for any person knowingly to sell to a juvenile an admission ticket or pass, or knowingly to admit a juvenile to premises whereon there is exhibited a motion picture, show or other presentation which, in whole or in part, depicts sexually explicit nudity, sexual conduct or sadomasochistic abuse and which is harmful to juveniles or to exhibit any such motion picture at any such premises which are not designed to prevent viewing from any public way of such motion picture by juveniles not admitted to any such premises.

(c) It shall be unlawful for any juvenile falsely to represent to any person mentioned in subsection (a) or subsection (b) hereof, or to his agent, that such juvenile is eighteen years of age or older, with the intent to procure any material set forth in subsection (a), or with the intent to procure such juvenile's admission to any motion picture, show or other presentation, as set forth in subsection (b).

(d) It shall be unlawful for any person knowingly to make a false representation to any person mentioned in subsection (a) or subsection (b) hereof or to his agent, that he is the parent or guardian of any juvenile, or that any juvenile is eighteen years of age, with the intent to procure any material set forth in subsection (a), or with the intent to procure such juvenile's admission to any

motion picture, show or other presentation, as set forth in subsection (b).

(e) Violation of any provision hereof shall constitute a Class I misdemeanor.

American Booksellers Association, Inc., and others[1] (collectively, the booksellers) brought a "civil rights complaint for declaratory and injunctive relief" in the United States District Court for the Eastern District of Virginia against the Director of Public Safety of the City of Alexandria and the Chief of Police of the County of Arlington, seeking to enjoin enforcement of the 1985 amendment. The district court held the amendment unconstitutional and enjoined its enforcement. The Attorney General of Virginia, who had intervened in the federal proceeding, appealed to the Court of Appeals for the Fourth Circuit, which affirmed the district court's decision.

The attorney general appealed to the Supreme Court of the United States. That Court, by opinion handed down January 25, 1988, *Virginia v. American Booksellers Ass'n, Inc.*, ___ U.S. ___, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988), did not accept the factual findings made by the lower federal courts and certified to us the two questions of Virginia law set forth above.[2]

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[1] Association of American Publishers, Council for Periodical Distributors Association, International Periodical Distributors Association, Inc., National Association of College Stores, Inc., Books Unlimited, Inc., Ampersand Books, Amy Bush and Jessica Bush (a minor).

[2] The certification procedure had not been available to the parties in the lower federal courts because our Rule 5:42 did not become effective until April 1, 1987, after the proceedings in those courts had been concluded.

II. PLAINTIFFS' EXHIBITS

The first certified question requires us to determine whether any of the 16 books introduced as exhibits by the booksellers in the district court are "harmful to juveniles" within the statutory definition. The books are:

R. Bell, Changing Bodies, Changing Lives (1980)

J. Betancourt, Am I Normal? (1983)

J. Blume, Forever . . . (1975)

P. Blumstein & P. Schwartz, American Couples (1983)

J. Collins, Hollywood Wives (1983)

A. Comfort & J. Comfort, The Facts of Love (1979)

S. Donaldson, Lord Foul's Bane (1977)

The Family of Woman (J. Mason ed. 1979)

P. Haines, The Diamond Waterfull (1984)

J. Joyce, Ulysses (1961)

J. Lindsey, Tender is the Storm (1985)

The New Our Bodies, Ourselves (J. Pincus and W. Sanford ed. 1984)

L. Niven & J. Pournelle, Lucifer's Hammer (1977)

The Penguin Book of Love Poetry (J. Stallworth ed. 1973)

M. Sheffield, Where Do Babies Come From? (1972)

J. Updike, The Witches of Eastwick (1984).

The booksellers contend that these books, displayed for sale in their stores, fall with the prohibition of the Virginia statute.

Because obscene material is outside the protection of the First Amendment, the states may prohibit its dissemination to adults as well as to children. A publication must be judged for obscenity as a whole, however, and not on the basis of isolated passages. *Roth v. United States*, 354 U.S. 476, 489, 77 S.Ct. 1304, 1311, 1 L.Ed.2d 1498 (1957). Published material may have an explicit sexual content which, while perhaps pornographic, falls short of the definition of obscenity. Even though such material may be entitled to the protection of the First Amendment insofar as adults are concerned, the states may, within a carefully defined framework, restrict the access of minors to such material. The basis of the states' authority to control the dissemination of such "borderline obscenity" to minors is based upon the states' legitimate concern with the protection of minors from material deemed "harmful" to them. *See Ginsberg*, 390 U.S. at 636-40, 88 S.Ct. at 1278-81; *Freeman v. Commonwealth*, 223 Va. 301, 309, 288 S.E.2d 461, 465 (1982).

The New York statute held constitutional in *Ginsberg* provided a tripartite test for the determination of material "harmful to minors." Under that test, such material must (1) predominantly appeal to the prurient, shameful or morbid interest of minors; (2) be patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and (3) be "utterly without redeeming social importance for minors." The three prongs of the test were stated conjuctively. The 1970 Virginia statute was substantially the same, although the term "juvenile" was used in place of "minor," and the statute was made applicable to persons

under the age of 18, where New York had drawn the line at age 17.

In *Miller*, decided in 1973, the Supreme Court made clear that the states might regulate the distribution of obscene material without the burden of showing that it was "utterly without redeeming social value," a test to which a majority of the Justices had never subscribed. *Miller* established the third prong of the tripartite test as a determination "whether the work, taken as a whole, lacks serious literary, artistic political, or scientific value." 413 U.S. at 24, 93 S.Ct. at 2615. As noted above, our General Assembly, in 1975, amended Code § 18.2-390(6) to incorporate the *Miller* formulation into the third prong of the tripartite test for material "harmful to juveniles." The nature of that third prong is crucial to our determination.

The first two prongs of the tripartite test, "prurient interest" and "patently offensive," are purely questions of fact for determination by a properly-instructed jury. *Miller*, 413 U.S. at 30, 93 S.Ct. at 2618. As an appellate court, we may not resolve them. The third prong, "lack of serious merit," however, is a mixed question of law and fact, *see Smith v. United States*, 431 U.S. 291, 301, 97 S.Ct. 1756, 1764, 52 L.Ed.2d 324 (1977), which we may properly decide. Because a work will not be deemed "harmful to juveniles" unless it meets all three prongs of the test, we consider the third prong alone.

The booksellers apprehend that a Virginia prosecutor might consider some of the 16 works in question as lacking "serious literary, artistic, political or scientific value for juveniles" because they would be unsuitable for young children, although suitable for older adolescents.

The attorney general responds that the focus of the inquiry is not upon the youngest members of the class, not upon the most sensitive members of the class, and not upon the majority of the class. A book will pass statutory muster, she contends, if it has serious value for a legitimate minority of juveniles, and in this context, a legitimate minority may consist of older, normal (not deviant) adolescents.

We agree with the attorney general. As Justice Blackmun observed in a similar context,

> [T]he Court's opinion stands for the clear proposition that the First Amendment does not permit a majority to dictate to discrete segments of the population . . . the value that may be found in various pieces of work. That only a minority may find value in a work does not mean that a jury would not conclude that "a reasonable person would find such value in the material taken as a whole." Reasonable people certainly may differ as to what constitutes literary or artistic merit. . . .[T]he Court's opinion today envisions that even a minority view among reasonable people that a work has value may protect that work from being judged "obscene."

(Citations omitted).

Pope v. Illinois, 481 U.S. 497, ___, 107 S.Ct. 1918, 1924, 95 L.Ed.2d 439 (1987) (Blackmun, J., concurring in part and dissenting in part). *See also Pinkus v. United States*, 436 U.S. 293, 299, 98 S.Ct. 1808, 1812, 56 L.Ed.2d 293 (1978); *Freeman v. Commonwealth*, 223 Va. at 312, 288 S.E.2d at 466-67. We conclude that if a work is found to have a serious literary, artistic, political or scientific value for a legitimate minority of normal, older adolescents, then it

cannot be said to lack such value for the entire class of juveniles taken as a whole.

The 16 books in question run the gamut, as the Supreme Court aptly put it, from classic literature to pot-boiler novels. Having examined them all, we conclude that although they vary widely in merit, none of them lacks "serious literary, artistic, political or scientific value" for a legitimate minority of older, normal adolescents. It would serve no purpose to review the books in detail. Because none of them meets the third prong of the tripartite test, we hold that none of the books is "harmful to juveniles" within the meaning of Code §§ 18.2-390 and 391. Accordingly, the first certified question is answered in the negative.

III. KNOWING DISPLAY AND PERUSAL

Since 1970, pursuant to the statutes enacted in the wake of *Ginsberg*, a bookseller has been confronted with a dual burden when an apparently youthful customer approaches the cash register to purchase a book: he must make a "reasonable bona fide attempt to ascertain the true age of such [putative] juvenile" (Code § 18.2-390(7)), and he is charged with general knowledge of the character and content of the books he has offered for sale. *See id.* The booksellers make no attack upon these statutes in their pre-1985 form, and, indeed, expressly conceded their constitutionality in oral argument at the bar of the Supreme Court of the United States. Their attack is limited to the 1985 amendment.

The 1985 amendment adds nothing to the dual burden which the booksellers have borne since 1970. Its

legislative purpose is plain: to preclude the perusal, by juveniles standing in a bookstore, of harmful materials they are unable to buy. Without the 1985 amendment, the protection of juveniles from harmful materials was obviously incomplete. The thrust of the amendment, therefore, was directed at the perusal of harmful materials by juvenile readers in bookstores, not at the method chosen by booksellers to display their wares for adults.

Perusal goes well beyond casual examination. "Peruse" is defined: "to examine or consider or survey with some attention and typically for the purpose of discovering or noting one or more specific points: look at or look through fairly attentively: go through: STUDY . . . READ . . . to read through or read over with some attention and typically for the purpose of discovering or noting one or more specific points. . . ." Webster's Third New International Dictionary 1688 (1976). The 1985 amendment is aimed at detailed examination of the kinds embraced in the foregoing definition, not the casual examination available to a customer who simply surveys the labels, jackets, or dustcovers of books displayed on a bookseller's shelves. We therefore conclude that the amendment is aimed not at the method chosen by the bookseller to display his wares for sale, but at the opportunity he may afford to juveniles to take off the shelves books which they are unable to buy, and to read them in the store.

We are considering a criminal statute, and in accordance with familiar principles, it is to be construed strictly, and against the Commonwealth. It cannot be extended by construction or by implication to favor the prosecution. *Harward v. Commonwealth*, 229 Va. 363, 365, 330 S.E.2d 89,

90 (1985); *Johnson v. Commonwealth*, 211 Va. 815, 819, 180 S.E.2d 661, 664 (1971).

Thus, to secure a conviction of a bookseller for its violation, the Commonwealth would have the burden of proving beyond a reasonable doubt that the defendant bookseller *knowingly* afforded juveniles an opportunity to peruse harmful materials, or took no reasonable steps to prevent such perusal when the juvenile's opportunity was reasonably apparent to the bookseller. The amendment's requirement of scienter is significant. It is coupled with the phrase "manner whereby juveniles may examine *and* peruse" (emphasis added). Thus, the amendment is not violated solely by a particular manner of displaying books for sale. A violation must consist of proof beyond a reasonable doubt that the bookseller knowingly afforded juveniles an opportunity to peruse harmful materials in his store or, being aware of facts sufficient to put a reasonable person on notice that such opportunity existed, took no reasonable steps to prevent the perusal of such materials by juveniles.

Because it is criminal in nature, the statute is not to be given the broad interpretation the booksellers apprehend. The word "may" in the amendment is not to be converted into "might." A scenario may always be envisioned wherein a juvenile, by stealth, secrets a book and manages to peruse it in a store despite the efforts of the most vigilant clerk. The absence of scienter precludes conviction of any bookseller under those circumstances. Reasonable efforts to prevent perusal of harmful materials by juveniles are all that the statute requires of a bookseller.

The question whether a bookseller's efforts were reasonable in any given set of circumstances is, of course, an issue of fact to be resolved by a properly-instructed jury, but certain general principles may be discerned. Ordinarily, it would be difficult for the Commonwealth to secure a conviction of a bookseller for violation of the statute without proof that juveniles had actually made use of an opportunity to peruse harmful materials in a bookstore with the defendant's apparent knowledge and acquiescence. But actual perusal is not an absolute requirement. If a bookseller were to display materials harmful to juveniles, provide an area in which they could be perused without observation by the bookseller or his employees, and take no reasonable steps to inhibit such perusal by juveniles, a jury properly instructed under the foregoing principles might convict even in the absence of proof that juveniles had actually taken advantage of the opportunity thus afforded to them.

One of the booksellers' witnesses in the district court provided a clear example of a method a bookseller might easily adopt to avoid such a problem. Under the construction we have adopted, there was evidence in the record that the statute would affect relatively few books – less than a single shelf of a typical bookseller's wares. The witness testified that in that particular store, a shelf containing restricted books was located within sight of the bookseller. If a juvenile attempted to peruse them, an employee could readily intervene. This imposes a relatively light burden upon the bookseller, in contrast to the state's interest in protecting juveniles from materials harmful to them.

In answering the specific inquiries certified to us, we must assume that there are no additional facts upon which the Commonwealth might rely in order to secure a conviction. We will further assume that the hypothetical bookseller "who has a policy of not permitting juveniles to examine and peruse materials covered by the statute" does not merely cerebrate upon such a policy, but takes reasonable steps to put it into effect. Upon those assumptions, the second certified question is answered in the affirmative.

The first certified question is answered in the negative.

The second certified question is answered in the affirmative.

APPENDIX 7

VIRGINIA, appellant, v. AMERICAN BOOKSELLERS ASSOCIATION, INC., et al. No. 86-1034.

Appeal from the United States Court of Appeals for the Fourth Circuit.

Former decision, 479 U.S. 1082, 107 S.Ct. 1281; 108 S.Ct. 341; 108 S.Ct. 448; 108 S.Ct. 636.

Case below, 238 Va. 168, 372 S.E.2d 618. *American Booksellers Ass'n v. Strobel,* 617 F.Supp. 699; 802 F.2d 691.

Oct. 17. 1988. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of *Commonwealth for Virginia v. American Booksellers Association, Inc., et al.* ___ Va. ___, 372 S.E.2d 618 (Sept. 23, 1988)

APPENDIX 8

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1961

AMERICAN BOOKSELLERS ASSOCIATION, INC.; ASSOCIATION OF AMERICAN PUBLISHERS; COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATION; INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, INC.; NATIONAL ASSOCIATION OF COLLEGE STORES, INC.; BOOKS UNLIMITED, INC.; AMPERSAND BOOKS

Plaintiffs-Appellees

v.

COMMONWELATH OF VIRGINIA

Defendant-Appellant

and

CHARLES STROBEL; WILLIAM K. STOVER

Defendants

No. 85-2284

AMERICAN BOOKSELLERS ASSOCIATION, INC.; ASSOCIATION OF AMERICAN PUBLISHERS; COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATION; INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, INC.; NATIONAL ASSOCIATION OF COLLEGE STORES, INC.; BOOKS UNLIMITED, INC.; AMPERSAND BOOKS

Plaintiffs - Appellants

and

AMY BUSH; JESSICA BUSH

Plaintiffs

v.

COMMONWEALTH OF VIRGINIA; CHARLES STROBEL; WILLIAM K. STOVER

Defendants-Appellees

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Richard L. Williams, United States District Court Judge. CA-85-816-A.

Argued: April 13, 1989 Decided: August 16, 1989

Before PHILLIPS and SPROUSE, Circuit Judges, and HAYNSWORTH, Senior Circuit Judge.

Richard B. Smith, Assistant Attorney General (Mary Sue Terry, Attorney General of Virginia; Mark R. Davis, Assistant Attorney General on brief) for Appellant. Michael A. Bamberger (Jacqueline S. Glassman, SONNENSCHEIN, CARLIN, NATH & ROSENTHAL on brief) for Appellees.

SPROUSE, Circuit Judge:

Since 1970, the Code of Virginia has prohibited any person from selling certain sexually explicit materials to juveniles. Va. Code § 18.2-391(a). In 1985, the Virginia General Assembly amended this provision to prohibit the "display for commercial purpose [of such materials] in a manner whereby juveniles may examine and peruse [them]." 1985 Va. Acts ch. 506. The district court, in an action brought by the American Booksellers Association, four other trade associations, and two retail store against public officials charged with the section's enforcement,[1]

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[1] The original defendants were the Chief of Police of Arlington County, Virginia, and the Director of Public Safety of

(Continued on following page)

declared the amendment facially unconstitutional and enjoined its enforcement. *American Booksellers Ass'n v. Strobel*, 617 F. Supp. 699 (E.D. Va. 1985). We affirmed the district court's decision, *American Booksellers Ass'n v. Virginia*, 802 F.2d 691 (4th Cir. 1986), but the Supreme Court of the United States, after noting probable jurisdiction, certified two questions to the Supreme Court of Virginia, *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, ___, 108 S. Ct. 636, 643 (1988), and has now vacated our decision and remanded for our reconsideration in light of the Virginia Supreme Court's answers. *Virginia v. American Booksellers Ass'n*, ___ U.S. ___, 109 S. Ct. 254 (1988). Having reconsidered, we now reverse the district court's judgment holding the amendment to section 18.2-391(a) unconstitutional.

The two questions certified to the Virginia Supreme Court by the Supreme Court of the United States were:

1. Does the phrase "harmful to juveniles" as used in Virginia Code §§ 18.2-390 and 18.2-391 (1982 and Supp 1987), properly construed, encompass any of the books introduced as plaintiffs' exhibits below, and what general standard should be used to determine the statute's reach in light of juveniles' differing ages and levels of maturity?

2. What meaning is to be given to the provision of Virginia Code § 18.2-391(a) (Supp 1987) making it unlawful "to knowingly display for commercial purpose in a manner

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(Continued from previous page)

the City of Alexandria, Virginia. The Attorney General of Virginia intervened on behalf of the Commonwealth.

> whereby juveniles may examine or peruse" certain materials? Specifically, is the provision complied with by a plaintiff bookseller who has a policy of not permitting juveniles to examine and peruse materials covered by the statute and who prohibits such conduct when observed, but otherwise takes no action regarding the display of restricted materials? If not, would the statute be complied with if the store's policy were announced or otherwise manifested to the public?

American Booksellers Ass'n, 484 U.S. at ___, 108 S. Ct. at 643.

The Supreme Court of Virginia held that none of the sixteen books introduced as exhibits in the district court trial were "harmful to juveniles" as that term is defined by Virginia Code § 18.2-390(6)(c), *i.e.*, that "when taken as a whole, [such books are] lacking in serious literary, artistic, political or scientific value for juveniles." *Commonwealth v. American Booksellers Ass'n*, 372 S.E.2d 618, 624 (Va. 1988). In response to the second certified question, the Virginia Supreme Court concluded that the new language contained in the 1985 amendment was not aimed at mere browsing but at "the opportunity [a bookseller] may afford to juveniles to take off the shelves books which they are unable to buy, and to read them in the store." *Id.* The Virginia court concluded, therefore, that in order to be convicted of violating the statute, a bookseller must have

> knowingly afforded juveniles an opportunity to peruse harmful materials in his store or, being aware of facts sufficient to put a reasonable person on notice that such opportunity existed,

> took no reasonable steps to prevent the perusal of such materials by juveniles.

Id. at 625. The Virginia Supreme Court also considered the booksellers' concern that they might be prosecuted for displaying material that a prosecutor deemed harmful to young children although suitable for older juveniles. The court concluded "that if a work is found to have a serious literary, artistic, political or scientific value for a legitimate minority of normal, older adolescents, then it cannot be said to lack such value for the entire class of juveniles taken as a whole." *Id.* at 624.

The American Booksellers Association and the other plaintiffs argue in this appeal that section 18.2-391(a) and the concomitant definitional provision, section 390(6)(c), are unconstitutionally vague even as interpreted by the Supreme Court of Virginia. We disagree. In defining "harmful to juveniles" in section 390(6)(c), the Virginia General Assembly, as did the New York legislature in enacting the New York statute which was upheld against a vagueness challenge in *Ginsberg v. New York*, 390 U.S. 629, 643 (1968), interpreted the statutory definition of "harmful to juveniles" in accordance with the current United States Supreme Court definition of obscenity.[2] The

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[2] The New York statutory definition of "harmful to minors," *i.e.*, that such material "is utterly without redeeming social importance for minors," N.Y. Penal Law § 484-h (1)(f), included the third prong of the obscenity definition then followed by a plurality of the United States Supreme Court. *See Memoirs of a Woman of Pleasure v. Attorney General of Massachusetts*, 383 U.S. 413, 418 (1966). The amended Virginia statute we consider substitutes the post-*Ginsberg* definition announced in *Miller v. California*, 413 U.S. 15, 24 (1973), and includes material that "is, when taken as a whole, lacking in serious literary, artistic, political or scientific value for juveniles." Va. Code § 18.2-391(a).

Virginia Court then concluded that the standard should be applied as it affects a "legitimate minority of normal, older adolescents." *American Booksellers*, 372 S.E.2d at 624. These holdings and the conclusive language detailing the statute's scienter requirements more than give "men in acting adequate notice of what is prohibited." *Ginsberg*, 390 U.S. at 643 (quoting *Roth v. United States*, 354 U.S. 476, 492 (1957)). We also agree with the Virginia Supreme Court that the amendment to the statute places a minimal burden on booksellers and represents a constitutionally permissive exercise of the state's police powers. *See American Booksellers*, 372 S.E.2d at 623, 625.

In view of the above, the judgment of the district court holding the amendment to section 18.2(a)(1) unconstitutional is reversed and its denial of attorneys' fees is affirmed.

AFFIRMED IN PART;
REVERSED IN PART.

APPENDIX 9

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1961

AMERICAN BOOKSELLERS ASSOCIATION, INC.; ASSOCIATION OF AMERICAN PUBLISHERS; COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATION; INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, INC.; NATIONAL ASSOCIATION OF COLLEGE STORES, INC.; BOOKS UNLIMITED, INC.; AMPERSAND BOOKS

Plaintiffs - Appellees

v.

COMMONWEALTH OF VIRGINIA

Defendant - Appellant

and

CHARLES STROBEL; WILLIAM K. STOVER

Defendants

No. 85-2284

AMERICAN BOOKSELLERS ASSOCIATION, INC.; ASSOCIATION OF AMERICAN PUBLISHERS; COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATION; INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, INC.; NATIONAL ASSOCIATION OF COLLEGE STORES, INC.; BOOKS UNLIMITED, INC.; AMPERSAND BOOKS

Plaintiffs - Appellants

and

AMY BUSH; JESSICA BUSH

Plaintiffs

v.

COMMONWEALTH OF VIRGINIA; CHARLES STROBEL; WILLIAM K. STOVER

Defendants - Appellees

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellees' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Sprouse with the concurrence of Judge Phillips and Judge Haynsworth.

For the Court,

JOHN M. GREACEN
CLERK

Supreme Court, U.S.
FILED
MAR 1 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1124

(2)

In The

Supreme Court of the United States

October Term, 1989

AMERICAN BOOKSELLERS ASSOCIATION, INC., ASSOCIATION OF AMERICAN PUBLISHERS, INC., COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATION, INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, NATIONAL ASSOCIATION OF COLLEGE STORES, INC., BOOKS UNLIMITED, INC., AND AMPERSAND BOOKS

Petitioners,

v.

COMMONWEALTH OF VIRGINIA

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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1pp

QUESTION PRESENTED

CAN A LOSING PLAINTIFF OBTAIN ATTORNEY FEES AS A "PREVAILING PARTY" UNDER 42 U.S.C. § 1988 WHEN HIS ARGUMENTS WERE REJECTED *IN TOTO* AND HE OBTAINED NO RELIEF FROM HIS LAWSUIT?

REASON FOR DENYING THE WRIT

The American Booksellers Association and several other parties ("plaintiffs") seek certiorari review of a judgment of the United States Court of Appeals for the Fourth Circuit denying them attorney fees from the Commonwealth of Virginia under 42 U.S.C. § 1988. Their theory is that they should be considered "prevailing parties" within "the spirit" of § 1988 because, but for their meritless lawsuit, the Supreme Court of Virginia would not have had the chance to hold that plaintiffs' proffered construction of the 1985 amendment to § 18.2-391(a) of the Code of Virginia and its alleged impact on them was totally wrong. Their argument is frivolous on its face.

In 1985, plaintiffs launched a pre-enforcement facial attack under 42 U.S.C. § 1983 and the Declaratory Judgment Act against a newly-enacted and never construed amendment to Virginia Code § 18.2-391(a) concerning the dissemination of pornography to children. They prevailed in the district court and the court of appeals where, as this Court has noted previously, the parties painted "strikingly different" pictures of the amendment: "[Plaintiffs] see the statute as a broad enactment, potentially applying to a large number of works"; Virginia, on the other hand, "argues that the statute's coverage is much narrower than plaintiffs allege. . . . It contends that the statute covers only a very few 'borderline' obscene works, and none of the exhibits introduced by plaintiffs." *Virginia v. American Booksellers Ass'n, Inc.*, 108 S.Ct. 636, 643 (1988).

This Court, though, rejected the findings of the district court and court of appeals: "This Court rarely reviews a construction of a state law agreed upon by the two lower federal courts. * * * However, this case presents the rare situation in which we cannot rely on the construction and findings below." 108 S.Ct. at 643 (citations omitted). Because the Court could not accept as binding on state courts and local prosecutors the narrow interpretation of the statute proffered by the Attorney General of Virginia, however, it certified two questions to the Supreme Court of Virginia concerning the amendment's scope and what compliance with it would require. *Id.*

The "strikingly different" views of the statute asserted by the parties did not change one whit in the Supreme Court of Virginia: plaintiffs continued to ascribe to the amendment the broadest possible meaning and application, while Virginia continued to argue as it had for several years that the provision was extremely narrow in scope and application. Rejecting *in toto* plaintiffs' expansive reading of the statute, the Supreme Court of Virginia held that the Attorney General's long-stated narrow view of the provisions' scope and compliance mechanism correctly stated the law. *Commonwealth v. American Booksellers Assoc.*, 236 Va. 168, 372 S.E.2d 618 (1988).

This Court thereafter vacated the decision of the Fourth Circuit and remanded the case for reconsideration in light of the state court's construction of the statute. *Virginia v. American Booksellers Association*, 109 S.Ct. 254 (1988). Plaintiffs even then continued to contend strenuously on remand that the amendment was "unconstitutionally vague even as interpreted by the Supreme Court

of Virginia." *American Booksellers Ass'n Inc. v. Commonwealth of Virginia*, 882 F.2d 125, 127 (4th Cir. August 16, 1989), *rehearing and rehearing en banc denied* (October 13, 1989). The court of appeals, however, rejected their contention and found the State's narrow view of the amendment as adopted by the Virginia Supreme Court to be constitutional and, accordingly, denied attorney fees to plaintiffs. *Id.* at 127-28.

Incredibly, plaintiffs now contend that the denial of attorney fees by the court of appeals conflicts with "the spirit" of 42 U.S.C. § 1988 because the Supreme Court of Virginia would not have had the opportunity to "authoritatively narrow the scope of the amendment" had plaintiffs not brought their lawsuit. (PL. BR. at 13). This argument, of course, ignores the fact that the interpretation of the statute by the Supreme Court of Virginia was the very one plaintiffs had fought *against* tooth and nail for over four years. And this claim ignores further that the Virginia Supreme Court did not "narrow the scope of the amendment" because that court did not give the provision a new construction; the amendment had never been construed previously by a Virginia court, and the construction given it by the Supreme Court of Virginia was exactly the same meaning the provision had had since its enactment.

This Court has held that a plaintiff cannot be a prevailing party for purposes of § 1988 attorneys' fee award unless he receives "at least some relief on the merits of his claim." *Hewitt v. Helms*, 482 U.S. 755, 760 (1987). The plaintiffs here received *no* relief from their lawsuit. The only thing they received was a finding that the 1985 amendment to Virginia Code § 18.2-391(a) meant exactly

what Virginia had said it meant from day one of the litigation in this case. *Contrast Texas State Teachers' Association v. Garland Independent School District*, 109 S.Ct. 1486 (1989) (plaintiff prevailing on significant, but not central, issue and obtaining some relief sought can be "prevailing party"); *see also Rhodes v. Stewart*, 109 S.Ct. 202 (1988) (plaintiff obtaining declaratory judgment not "prevailing party" if judgment does not affect defendant's behavior towards that plaintiff).

CONCLUSION

Plaintiffs' argument is akin to a prospector drilling for oil against all advice, hitting a "dry hole," and then claiming a finder's fee for proving that there was nothing there to begin with. To allow them to obtain § 1988 attorney fees as a "prevailing party" under the circumstances of this case would guarantee that every litigant who files a frivolous lawsuit under § 1983 claiming that a statute has an unconstitutional impact on him would be entitled to attorney fees – even when the court, as here, rejects every argument he makes and holds the impact claimed by him to be totally nonexistent. Plaintiffs concede implicitly that their claim is not within the letter of

§ 1988, and it just as surely is not within "the spirit" of that provision either. This Court should deny the plaintiffs' frivolous petition for a writ of certiorari.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA
Respondent herein

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